

REGULATION OF THE UPSTREAM PETROLEUM INDUSTRY

A comparative analysis and evaluation of the
regulatory frameworks of South Africa and Namibia

by
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Supervisor: Professor Hanri Mostert



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Abstract

Controversy surrounds the upstream petroleum industry. Although the benefit of petroleum resources is beyond dispute, the exploitation of petroleum resources comes at a price, as history has shown time and again. Not only does petroleum exploitation have detrimental effects on the environment, but host countries often are worse off than countries with little or no petroleum resources. This “resource curse” is partially the result of flawed regulatory frameworks for petroleum resource extraction in host countries.

This thesis identifies three elements that must be present in a country’s regulatory framework for petroleum extraction if the resource curse phenomenon is to be avoided and benefits from petroleum are to be maximised. These elements are: transparency, accountability and a balance of interests between the petroleum companies and the host nation.

Namibia and South Africa are not yet major players in the international upstream petroleum industry. There is accordingly not much academic engagement with petroleum law in these two jurisdictions. The courts have also not yet had the opportunity to scrutinise the legislation regulating the upstream petroleum industries of South Africa and Namibia. There are, however, indications that both countries may possess viable quantities of petroleum resources. In anticipation of the possibility of finding commercially viable quantities of petroleum, South Africa and Namibia have enacted legislation to regulate the upstream petroleum industry, but the efficiency of the legislation, specifically how it reflects the elements of transparency, accountability and balance of interest, have not yet been considered.

The research for this thesis is driven by the question of how the regulatory framework for petroleum exploitation in South Africa and Namibia embraces the elements of transparency, accountability and balance of interest. The purpose of this thesis is to examine the regulatory frameworks for upstream petroleum resources in South Africa and Namibia in anticipation of the demands that will be placed on law as the sectors grow. In doing so, this thesis scrutinises the legislation in South Africa and Namibia to

determine the extent to which the three crucial elements of transparency, accountability and balance of interest between the petroleum company and the host nation are reflected in the regulatory frameworks for petroleum resources.

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List of Abbreviations

AAA	Affirmative Action (Employment) Act 29 of 1998
ACA	Anti-Corruption Act 8 of 2003
APT	Additional Profit Tax
AU Convention	African Union Convention on Preventing and Combating Corruption, 11 July 2003
BEE	Black Economic Empowerment
BEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003
CATOC	Transnational Organised Crime Convention
CGT	Capital Gains Tax
Chief Inspector	Chief Inspector of Petroleum Affairs
Code	Code of Good Practice, published in terms of the BEE Act
Commissioner	Commissioner of Petroleum Affairs
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
ECC	Environmental Clearance Certificate
EEA	Employment Equity Act 55 of 1998
EIA	Environmental Impact Assessment
EMA	Environmental Management Act 7 of 2007
EMP	Environmental Management Plan
Empowerment Strategy	South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment
HDSA	Historically Disadvantaged South Africans
MPA	Model Petroleum Act
MPRDAA	Mineral and Petroleum Resources Development Amendment Act 49 of 2008

MPRD Act	Mineral and Petroleum Resources Development Act 28 of 2002
MPRD Regulations	Mineral and Petroleum Resources Development Regulations, published under the MPRD Act
MPRRA	Mineral and Petroleum Resources Royalty Act 28 of 2008
MPRRAA	Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008
Namcor	The National Petroleum Corporation of Namibia (Pty) Ltd
Namibian Constitution	Constitution of the Republic of Namibia, 1990
NEEEF	The New Equitable Economic Empowerment Framework
NEEEF Commission	Commission for New Equitable Economic Empowerment Framework
NEMA	National Environmental Management Act 107 of 1998
NRST	Non-resident Shareholder Tax
OECD	Organisation for Economic Cooperation and Development
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Just Administrative Action Act 3 of 2000
PCCAA	Prevention and Combating of Corrupt Activities Act 12 of 2004
Petroleum Act	Petroleum (Exploration and Production) Act 2 of 1991
Petroleum Agency SA	South African Agency for the Promotion of Petroleum Exploration and Exploitation (Pty) Ltd
Petroleum Charter	Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry
Petroleum Regulations	Regulations relating to the health, safety and welfare of persons employed, and protection of other persons, property, the environment and natural resources in, at or in the vicinity of exploration and production areas

PIT	Petroleum Income Tax, levied in terms of the Petroleum (Taxation) Act
SADC Protocol	SADC Protocol Against Corruption, 14 August 2001
Scorecard	Generic Scorecard published in terms of the BEE Act
South African Constitution	Constitution of the Republic of South Africa, 1996
UN Convention	United Nation Convention Against Corruption, 29 September 2003

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Map of Hydrocarbon Activities in Namibia

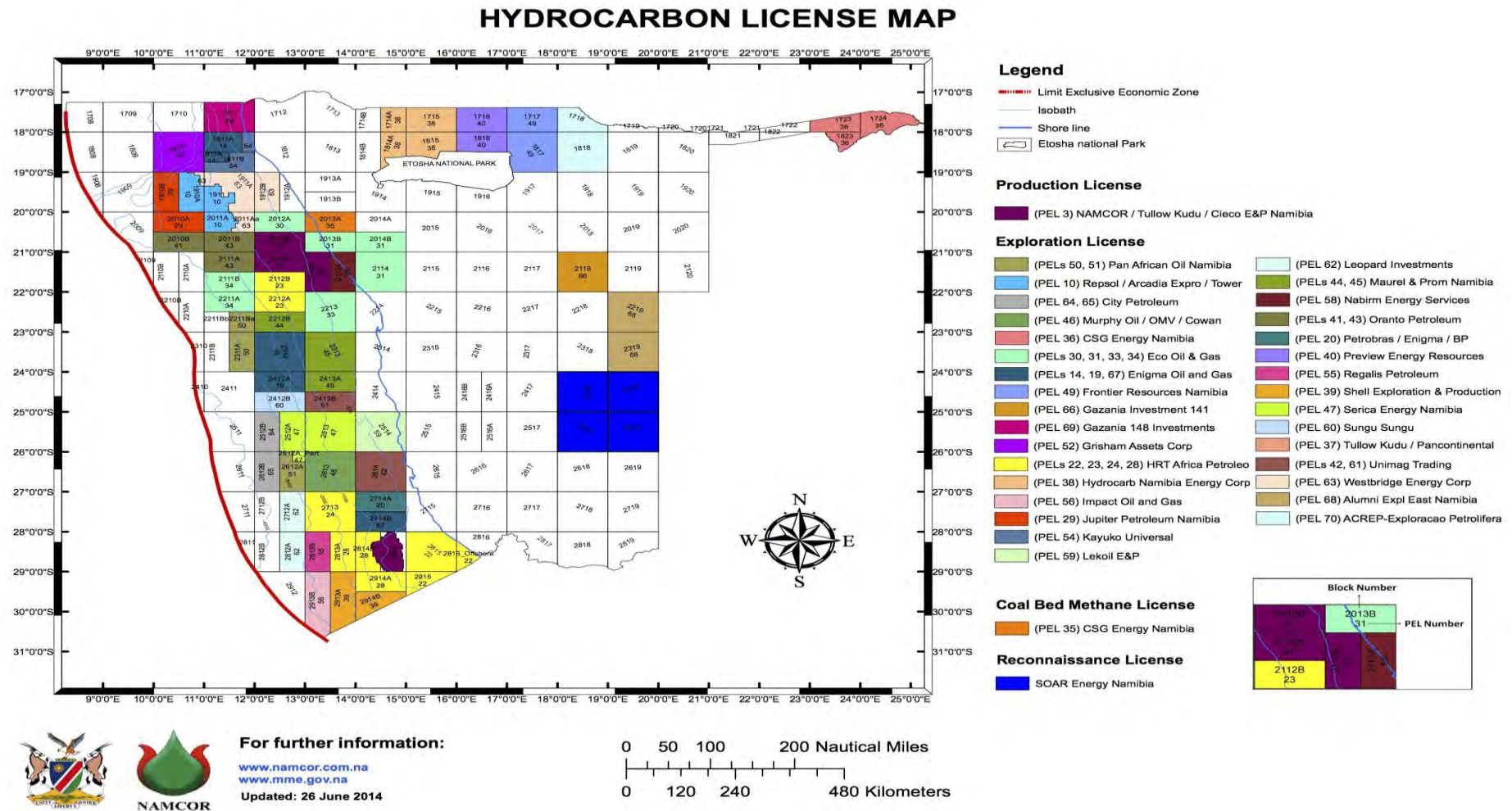


Figure 2: Hydrocarbon licences in Namibia
<http://www.namcor.com.na/hydrocarbon-licence-map>, accessed 25.02.2015

Chapter One:

INTRODUCTION

1. Problems Caused by Petroleum

The petroleum industry is big. It has been the biggest industry in the world for the last century.¹ It is worth multiple trillions of dollars.² It shapes economies and exerts great influence on politics.³ Natural oil and gas – referred to here jointly as petroleum⁴ – have been used by the human race since 4,000 BC.⁵ Crude oil is the most important source of energy in the world and is by far the largest single commodity in international trade.⁶ It is likely to continue to be a key driver in the world economy for the foreseeable future.⁷

Despite attempts to address the energy needs of the world by diversifying into renewable energies, the demand for petroleum is still on the increase.⁸ As existing petroleum sources are depleted, new technology drives the petroleum industry to areas previously unexplored or thought not to be viable reservoirs for petroleum.⁹ The attention of the world's petroleum companies is now on Africa and its petroleum resources, where there may still be new openings in the petroleum industry.¹⁰

¹ Ross ML *The Oil Curse* (2012) New Jersey Princeton University Press at 1; Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.14.

² Hammerson M *Upstream Oil and Gas* (2011) London Globe Law and Business at 31.

³ Hammerson (note 2) at 31.

⁴ See Chapter Two for a more detailed discussion of the meaning of petroleum. Throughout the thesis, reference will be made to petroleum and in certain instances to natural gas and natural oil or crude oil. Where reference is only made to oil or gas, it is a reference to natural oil and natural gas.

⁵ See for example Downey M *Oil 101* (2009) La Vergne Wooden Table Press LLC at 1.

⁶ Ikenna N "'International Petroleum Law': Has it Emerged as a Distinct Legal Discipline?" 1996 (8) *African Journal of International and Comparative Law* 428 at 428; Parra F *Oil Politics: A Modern History of Petroleum* (2010) New York I.B. Taurus & Co Ltd at 1.

⁷ Picton-Turbervill G "Preface" in G Picton-Turbervill (ed) *Oil and Gas: A Practical Handbook* (2009) London Globe Business Publishing Ltd at 5.

⁸ Picton-Turbervill (note 7) at 5.

⁹ See for example Chapter Two. See also Picton-Turbervill (note 7) at 5; Ross (note 1) at 9.

¹⁰ Clarke D *Africa: Crude Continent* (2010) London Profile Books Ltd at 80.

Notwithstanding the scale and importance of the petroleum industry, petroleum comes at a high price.¹¹ This valuable resource is typically found in regions that are geologically or politically speaking most risky.¹² Human rights violations are frequent in the petroleum industry, which is perceived to be driven by greed and characterised by violence.¹³ One author comments that “[t]he annals of oil are an uninterrupted chronicle of naked aggression, genocide and the violent law of the corporate frontier.”¹⁴

Oil wealth also gives rise to a paradox.¹⁵ All through history, countries well-endowed with mineral and petroleum resources generally (but not always)¹⁶ tended to end up worse off economically and/or politically than those less endowed.¹⁷ This is commonly referred to as the “resource curse” and is particularly visible in Africa¹⁸ and in the Middle East.¹⁹ References to “the resource curse” often entail the observation that countries rich in natural resources tend to fail to show the rapid economic development one may expect;²⁰ and such references highlight the anomalies created by large-scale personal poverty in resource-rich countries.²¹

The paradoxes of resource wealth, and the possible causes of the resource curse must be understood against the backdrop of natural resource wealth being different from other forms of wealth.²² Unlike other sources of wealth, the generation of natural resource wealth is, so to speak, “enclaved”; the exploitation of natural resource wealth is separated from other industrial sectors and can take place without the participation of

¹¹ Roberts J "A Primer on Oil" in S Tsalik and A Schiffrin (eds), *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Society Institute at 31.

¹² Roberts (note 11) at 31

¹³ Watts M "Economies of Violence: More Oil, More Blood" 2003 (38) *Economic and Political Weekly* 5089 at 5089; Ross (note 1) at 1.

¹⁴ Watts (note 13) at 5089.

¹⁵ Ross (note 1) at 2 refers to the “irony of oil wealth”.

¹⁶ Norway, Canada, United Kingdom and to some extent the United States are examples of countries with few ill effects as a result of oil. See Ross (note 1) at 2.

¹⁷ Sachs J and Warner A "The Curse of Natural Resources" 2001 (45) *European Economic Review* 827 at 828.

¹⁸ Soros G "Foreword" in Humphreys M, Sachs JD and Stiglitz JE (eds), *Escaping the Resource Curse* (2007) New York Columbia University Press at xi.

¹⁹ Stiglitz J "Making Natural Resources into a Blessing rather than a Curse" in Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Society Institute at 13; Ross (note 13) at 2.

²⁰ Sachs and Warner (note 17) at 828; Ross (note 1) at 1.

²¹ Stiglitz (note 19) at 13.

²² Humphreys M, Sachs J and Stiglitz J "Introduction: What is the Problem with Natural Resource Wealth?" in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at 3.

major sectors of the domestic labour force.²³ In fact, petroleum exports often exclude other promising sectors.²⁴ A government can access this wealth without the co-operation of its citizens or institutions.²⁵ The reason for this is that there is so much money in petroleum resources that the exploitation of the resource can fund itself, resulting in a situation where the government draws sufficient revenue from the resource so that it is unnecessary to tax ordinary citizens.²⁶ This, in the long run, is an unsustainable situation, as no taxation leads to no representation by the government.²⁷ The resultant weak linkages between the government and its citizens lead to an unaccountable state, as citizens often have less information about state activities and states have less need to engage their citizens.²⁸ In fact, it has been held that a lack of reliance on tax revenue in favour of a dependence on external revenue sources hinder the development of resource-rich countries.²⁹

Weak linkages of the petroleum industry with other sectors are also caused by the fact that in many countries, petroleum exploitation operations are large-scale, capital intensive and foreign-owned, which results in countries frequently not getting the full value of their resources.³⁰ The reason for this can be traced to the fact that these countries, specifically those with viable quantities of petroleum, often do not have the financial or technological capacity to extract the resources.³¹ Petroleum extraction is a capital-intensive exercise and states therefore have to rely on private entities to extract the resources.³² This, however, gives rise to a conflict: while states will want to ensure that the benefit of their petroleum resources resorts to the country as a whole, private entities will seek to ensure their own income or benefit, using a country's resource

²³ Humphreys, Sachs and Stiglitz (note 22) at 4.

²⁴ Karl T "Understanding the Resource Curse" in Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Society Institute at 24.

²⁵ Humphreys, Sachs and Stiglitz (note 22) at 4.

²⁶ See for example Nakhle C *Petroleum Taxation* (2008) Oxon Routledge at 10.

²⁷ Nakhle (note 26) at 10; Ross (note 1) at 5 – 6.

²⁸ Humphreys, Sachs and Stiglitz (note 22) at 11.

²⁹ Humphreys, Sachs and Stiglitz (note 22) at 12.

³⁰ Stiglitz J "What Is the Role of the State?" in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at 24; Karl (note 24) at 24; Ross (note 1) at 6.

³¹ Humphreys, Sachs and Stiglitz (note 22) at 4-5.

³² Easo J "Licences, Concessions, Production Sharing Agreements and Service Contracts" in Picton-Turbervill G (ed) *Oil and Gas: A Practical Handbook* (2009) London Globe Business Publishing Ltd at 2.

wealth for their own interests.³³ As a result, there are few productive links with the rest of the country's economy.³⁴

A second key problem underlying the resource curse is that wealth emanating from natural resources, especially from petroleum, is invariably impacted by the fact that the source of such wealth is non-renewable. As such, these resources are more like an asset than source of income.³⁵ Once the resource is depleted, the revenue generated from the resources typically ceases as well.³⁶ The extraction of petroleum resources therefore has economic consequences for the host state.³⁷ Petroleum exploitation "liquidates the assets, and the State can no longer realise revenue from this asset".³⁸ Host states must therefore also promote the sustainable extraction of the resource by establishing a legislative framework for petroleum exploration and production that provides enduring social and economic benefits for the host state and its people.³⁹

The fact that the petroleum sector is detached from the domestic political and economic processes and the concomitant non-renewable nature of petroleum resources has given rise to the emergence of a major risk, namely "rent-seeking behaviour".⁴⁰ Economic rent, as it applies to petroleum, refers to the surplus revenue of the resource after deducting the capital and labour costs.⁴¹ The economic rent which exists between the value of the resource and the costs of extraction is also referred to as a gap.⁴² The prospects of substantial economic rent create incentives for individuals (whether private

³³ Stiglitz (note 18) at 24.

³⁴ Karl (note 24) at 24.

³⁵ Humphreys, Sachs and Stiglitz (note 22) at 4.

³⁶ Hunter T *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis* (unpublished PhD-thesis, University of Bergen, 2010) at 64.

³⁷ Hunter T "Sustainable Socio-economic Extraction of Australian Offshore Petroleum Resources through Legal Regulation: Is it Possible?" (2011) *Journal of Energy and Natural Resources Law* 209 at 210.

³⁸ Hunter (note 37) at 210.

³⁹ Hunter (note 37) at 210–211.

⁴⁰ Humphreys, Sachs and Stiglitz (note 22) at 4.

⁴¹ Nakhle (note 26) at 17; Nakhle C "Petroleum Fiscal Regimes: Evolution and Challenges" in Daniel P, Keen M and McPherson C (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) London Routledge at 16. Nakhle here defines economic rent as "the true value of the natural resource, the difference between the revenues generated from resource extraction and the costs of extraction".

⁴² Humphreys, Sachs and Stiglitz (note 22) at 4.

sector actors or politicians) to use political mechanisms to capture the rents.⁴³ This in turn may create opportunities for rent-seeking by corporations and corrupt practices which compound the negative economic and political consequences of natural resource wealth.⁴⁴

With the above in mind, the “resource curse” may be a result of various factors. One factor may be the so-called “Dutch Disease”, which refers to the negative effect that the increase in currency value as a result of the resource income has on the competitive position of other industries in the country.⁴⁵ As stated above, petroleum exports often act to exclude other promising export sectors, especially manufacturing and agriculture.⁴⁶ This makes economic diversification particularly difficult⁴⁷ as the increase of currency value as a result of the petroleum income renders other industries in the country internationally uncompetitive.⁴⁸ Policymakers, in response, adopt strong protectionist policies to sustain increasingly non-competitive economic activities. This places a funding burden on the oil sector.⁴⁹ As other sectors become more dependent on the transfers from petroleum, dependence on petroleum is reinforced, which in turn removes incentives for more efficient use of capital and over time this may result in a permanent loss of competitiveness.⁵⁰ The foreign exchange earned from petroleum operations are often used to source internationally traded goods, which reduces demand for locally manufactured goods.⁵¹ Domestic resources (such as labour and materials) are pulled into the petroleum sector, increasing the price of these resources in the domestic market which in turn increases the costs to producers in other sectors.⁵² All this sets in motion a dynamic whereby the importance of the petroleum and

⁴³ Humphreys, Sachs and Stiglitz (note 22) at 4; Broadway R and Keen M “Theoretical Perspectives on Resource Tax Design” in Daniel P, Keen M and McPherson C (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) Oxon Routledge at 15.

⁴⁴ Humphreys, Sachs and Stiglitz (note 22) at 4.

⁴⁵ Soros (note 18) at xi; Ross (note 1) at 47.

⁴⁶ Karl (note 24) at 23.

⁴⁷ Karl (note 24) at 23.

⁴⁸ Downey (note 5) at 67.

⁴⁹ Karl (note 24) at 23-24.

⁵⁰ Karl ((note 24) at 24.

⁵¹ Humphreys, Sachs and Stiglitz (note 22) at 5.

⁵² Humphreys, Sachs and Stiglitz (note 22) at 5; Ross (note 1) at 48.

construction sectors are elevated above the importance of other, more established and traditional export sectors.⁵³

Another factor that may contribute to the resource curse is the disruptive effects that fluctuation in commodity prices may have.⁵⁴ The oil market is arguably the most volatile market in the world.⁵⁵ Policymakers are faced with the difficulty of effectively managing the sudden rise and fall of oil prices.⁵⁶ The high volatility of petroleum income makes long-term planning difficult.⁵⁷ The problem is exacerbated by international lending: when prices and outputs are high, the host country often borrows from international lenders, but when prices fall, international lenders demand repayment.⁵⁸

The resource curse may also result from the failure to enforce property rights; in other words, a failure by a host government to recognise that natural resources ultimately belong to the nation and that the benefit of these resources must accrue to the nation may add to the resource curse.⁵⁹ The lack of transparency in recognising property rights gives rise to issues of accountability of a state towards its citizens in enforcing property rights.

Another possible contributor to the resource curse is the effect of petroleum resources on the political conditions in a host country.⁶⁰ An overdependence on petroleum exports is strongly associated with weak public institutions that lack the capacity to handle the challenges of petroleum development.⁶¹ Institutions must be strong to handle the influx from petroleum rents, otherwise a “rentier state” is formed, ie one that lives of the petroleum profits.⁶² Timing is important. Proper institutions must already be in

⁵³ Humphreys, Sachs and Stiglitz (note 22) at 5.

⁵⁴ Soros (note 18) at xi; Karl (note 24) at 23; Ross (note 1) at 6.

⁵⁵ Karl (note 24) at 23.

⁵⁶ Karl (note 24) at 23.

⁵⁷ Humphreys, Sachs and Stiglitz (note 22) at 6.

⁵⁸ Humphreys, Sachs and Stiglitz (note 22) at 6.

⁵⁹ Wenar L "Property Rights and the Resource Curse" 2008 (36) *Philosophy and Public Affairs* 2 at 9.

⁶⁰ Soros (note 18) at xi. After oil was discovered in Venezuela, the country went from a functioning democracy with the highest per capita income in South America to a state of near-civil war and a per capita income lower than what it was in 1960. See Useem J "'The Devil's Excrement'" *Fortune Magazine* (03.02.2003) .

⁶¹ Karl (note 24) at 25.

⁶² Karl (note 24) at 25.

place when called upon to deal with the challenges of petroleum development. “Institutions” include a strong, functioning democracy,⁶³ proper control over corruption and environmental protection⁶⁴ and a recognition of citizens’ property right in petroleum resources.⁶⁵ For example, recent discoveries of natural gas and coal in Mozambique and gold in Tanzania have led to a focus on proper institutions in these two countries as measures of avoiding the resource curse. Both countries have signed on to the Extractive Industries Transparency Initiative, which may help in controlling corruption and fostering public debate.⁶⁶ Mozambique is already considering setting up a sovereign wealth fund, while Tanzania’s president has undertaken to do so.⁶⁷ There is also already a call for legislating transparency in Mozambique and a commitment by the Mozambiquan government to manage public finance in a responsible, accountable and transparent manner.⁶⁸

Host countries also often have to deal with the issue of the pace at which resources should be extracted. Extracting valuable resources by itself lowers a country’s wealth, as these resources are non-renewable. This loss can only be recovered by maximising revenue received from the exploitation of these resources and properly applying the revenue.⁶⁹ Extracting resources too quickly may not be in the country’s best interest and a better option may in fact be to leave the resources *in situ* until value has increased as a result of an increase in demand.⁷⁰

Finally, secrecy is also a contributing factor to the resource curse and is a key reason why petroleum revenues are often squandered by host countries.⁷¹ For example, during

⁶³ Humphreys, Sachs and Stiglitz (note 22) at 12.

⁶⁴ Humphreys, Sachs and Stiglitz (note 22) at 12 – 13.

⁶⁵ Wenar (note 59) at 9.

⁶⁶ Shankleman J “Avoiding the Resource Curse in East Africa’s Oil and Natural Gas Boom” *New Security Beat* 14 February 2013, available at <http://www.newsecuritybeat.org/2013/02/avoiding-resource-curse-east-africas-oil-natural-gas-boom/> [accessed 25.02.2015].

⁶⁷ Shankleman (note 66).

⁶⁸ Jackson J “News Analysis: Resource Curse Casts a Shadow on Mozambique’s Door” *Business Day Live* 13 March 2013, available at <http://www.bdlive.co.za/world/africa/2013/03/13/news-analysis-resource-curse-casts-a-shadow-on-mozambiques-door> [accessed 25.02.2015].

⁶⁹ Stiglitz (note 19) at 14.

⁷⁰ Stiglitz (note 19) at 14.

⁷¹ Ross (note 1) at 6.

the reign of Saddam Hussein, more than half of Iraq's expenditures were channelled through its national oil company, whose budget was kept secret.⁷²

Various international movements aimed at addressing and curing the resource curse have emerged. These movements identify transparency in the extractive industries and accountability of states in regulating natural resources as key in addressing the resource curse.⁷³ There are also a number of publications, aimed at breaking the resource curse by promoting transparency and accountability in the extractive industries.⁷⁴ Several difficult policy questions for the host governments and for the international community arise because of the “perverse effects” that natural resources have on economic and political outcomes in developing states and the conflicting interests between parties.⁷⁵ States have to determine how to engage with petroleum companies (mostly from developed countries) to ensure that on the one hand the resources are exploited for the benefit of the country as a whole, while on the other hand the entities actually doing the exploitation are rewarded for their endeavours.⁷⁶ In the process of engagement, the choice of an enabling and suitably protective legal framework is crucial. This is what this thesis is about.

⁷² Ross (note 1) at 6.

⁷³ In 2003, Global Witness and other non-governmental organisations launched a *Publish what you Pay* campaign. This campaign is aimed at promoting full transparency in the receipt, payment and management of revenues paid by resource extraction companies to countries. See African Development Bank and the African Union *Oil and Gas in Africa* (2009) New York Oxford University Press Inc at 116–117. The *Publish what you Pay* campaign was immediately pursued by the British Government and became the Extractive Industries Transparency Initiative (“EITI”). The EITI is a stakeholder-driven initiative launched in 2003 after the British Government convened a group of resource-rich countries, extractive companies and civil organisations to develop the EITI methodology. It sets out various EITI requirements which countries implementing the EITI must incorporate and follow. The Open Society Institute’s *Revenue Watch* project views the revenues created by natural resources as an issue of great importance for regional development and the promotion of civil society. Its aim is to institutionalise the EITI and to broaden public understanding of the resource curse. Over twenty countries, most from Africa, have committed to the principles of criteria of EITI. Although it is voluntary, the EITI has shown some significant achievements. Soros (note 18)) at xiv; Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Institute Society at 6; African Development Bank and the African Union (note 73) at 114–115.

⁷⁴ See Tsalik and Schiffrin (note 73); Schulz J *Follow the Money: A Guide to Monitoring Budgets and Oil and Gas Revenues* (2005) New York Open Institute Society and Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press. See also www.revenuewatch.org.

⁷⁵ Humphreys, Sachs and Stiglitz (note 22) at 2.

⁷⁶ Stiglitz (note 30) at 24.

2. Research Question and Objectives

This thesis deals with state regulation of petroleum resources. It pursues the question of how the role of the state, as regulator of access to petroleum resources and as agent of its people, should be understood and reinforced in law, in matters pertaining to the exploration and production of petroleum resources in South Africa and Namibia.

Despite the unmatched size of the global petroleum industry, there is a notable lack of case law and academic discussion about petroleum law.⁷⁷ This is particularly true for South Africa and Namibia. The petroleum industries of South Africa and Namibia are still relatively young and underdeveloped and the potential of petroleum resources in these two countries are unconfirmed.⁷⁸ Despite this, some of the problems related to petroleum discussed above show the importance of having a proper regulatory framework for petroleum exploitation in place from the outset. In the light hereof, this thesis takes a forward-looking approach as opposed to a reactive approach and evaluates the framework should viable quantities of petroleum be found in either or both countries.

In line with the global trend in respect of petroleum resources, both South Africa and Namibia vest the control over petroleum resources in the State.⁷⁹ Unlike many other countries, however, South Africa and Namibia are post-colonial and post-apartheid countries marked by racial inequity and unequal access to the economy and specifically to natural resources.⁸⁰ The legislative framework within which petroleum exploitation operates takes this into account and is designed in such a way that it redresses past wrongs and aims to ensure that the people of South Africa and Namibia share in the benefit of the exploitation of petroleum resources within the national boundaries.⁸¹ To encourage the development of the petroleum industry, however, the regulatory framework for petroleum must also be attractive to investors.

⁷⁷ Hammerson (note 2) at 31.

⁷⁸ Clarke (note 10) at 340 and 347. See Chapter Five and Chapter Seven below for a discussion of the South African and Namibian petroleum industries.

⁷⁹ See section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 and article 100 of the Constitution of the Republic of Namibia, 1990.

⁸⁰ Mostert H *Mineral Law: Principles and Policies in Perspective* (2012) Cape Town Juta and Co. Ltd. at 30–35 and 51–53.

⁸¹ See Chapter Four and Chapter Eight below.

The thesis proceeds from the assumption that to achieve a balance between ensuring a benefit for the nation as a whole and private entity interest in respect of the exploitation of petroleum resources, it is important for a state to have a proper regulatory framework within which petroleum exploitation takes place. This depends on various measures which are put in place to regulate ownership of, control over and access to petroleum resources within a host country. All these measures must act in concert to ensure the existence of a proper regulatory framework; one that balances the rights of all interested parties and that ensures that the country as a whole benefits from the exploitation of petroleum resources.

The research is undertaken to determine and evaluate the regulatory framework for petroleum in South Africa and Namibia. The evaluation of the regulatory framework for petroleum is in turn aimed at determining how the balance is struck in both of these jurisdictions between the interests of petroleum companies exploiting petroleum resources, and the interests of the Namibian and South African people, through their elected representatives in government. Central to the primary purpose is the role that the state plays in the exploitation of the petroleum resources of South Africa and Namibia.

Another purpose of the research is to determine what the main features of a law should be if it is expected to ensure that a host government, acting as the agent of its citizens, must ensure the best possible benefit for the people while protecting investment in the industry. This is done by identifying certain elements that are crucial in a petroleum regulatory regime in the light of the problems caused by petroleum.

2.1 Motivation

The discussion above has, in very broad terms, flagged the problems caused by petroleum. In short, without proper regulation, petroleum exploitation may give rise to numerous problems for a country and the resource wealth of a country may in fact be to its detriment. To address this, a host government may put in place a variety of policy

measures to increase the chances of obtaining more revenues and ensuring revenues are well spent.⁸²

2.1.1 Transparency

Possibly the most important set of policies regarding natural resources are those that deal with increased transparency.⁸³ For a petroleum regulatory system to function properly, the system has to be transparent.⁸⁴ Transparency means that there has to be an openness and certainty in respect of the framework under which rights to petroleum are granted and managed. Transparency also means that there must be an availability of information.⁸⁵ Both petroleum companies and the public must have a clear understanding of the procedures set out for obtaining rights, content of rights and obligations of holders.⁸⁶ There must also be transparency as regards the amounts received by government in exchange for access to petroleum, how government uses these amounts, how much resources are produced and where these resources go once produced.⁸⁷ It is also important to know what exactly the role of the state is in respect of petroleum resources⁸⁸ and how the state's powers in respect of petroleum are limited.⁸⁹ Promoting transparency will in turn assist to control corruption by limiting the scope for corruption⁹⁰ and will generally improve government credibility.⁹¹

2.1.2 Accountability

The principle of sovereignty is what empowers a state to assume control over the petroleum resources within its boundaries.⁹² In terms of the principle of permanent sovereignty over natural resources, each state is entitled to exercise control over the

⁸² Stiglitz (note 19) at 16.

⁸³ Stiglitz (note 19) at 16; Juhasz A *The Tyranny of Oil* (2009) New York HarperCollins Publishers at 17.

⁸⁴ Stiglitz (note 30) at 26.

⁸⁵ See for example Hopwood G *Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploration* (2013) Windhoek Institute for Public Policy Research at 6.

⁸⁶ See Chapter Five below.

⁸⁷ Stiglitz (note 19) at 16.

⁸⁸ See Chapter Four below.

⁸⁹ See Chapter Nine below.

⁹⁰ Stiglitz (note 30) at 26; Stiglitz (note 19) at 16.

⁹¹ Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 30.

⁹² See Chapter Three below.

natural resources within its boundaries.⁹³ Ownership of petroleum resources is an attribute of sovereignty.⁹⁴ Sovereignty, however, ultimately serves the people.⁹⁵ When a host country exercises control over access to petroleum resources, it does so as agent of its people. Governments therefore cannot act in their own interests when granting access to petroleum resources, but must faithfully serve the interest of the people whom they represent.⁹⁶ Petroleum companies, on the other hand, are concerned with furthering the interests of their shareholders. They accordingly have a very different motivation for extracting the resources, compared to governments. There also, frequently, seem to be a natural tension between the varying interests of governments, and those of the petroleum companies, who will want to obtain extractive rights on the most favourable terms, perhaps even if this means resorting to practices corrupting weak governments.⁹⁷

Measures must be in place to hold the host government accountable to its people where it fails to exercise control over petroleum resources for the benefit of its people. Therefore, another important policy choice with regard to the regulatory framework for petroleum resources is how governments are held accountable to their citizens. Related to accountability is how the powers of government in respect of petroleum resources are limited.⁹⁸ The state's powers may be limited by entrenching the right to just administrative action, promoting access to information and criminalising corrupt practices.⁹⁹

2.1.3 Interest Balancing

Finally, states have an obligation to ensure that their petroleum resources are exploited for the long-term benefit of its people.¹⁰⁰ Petroleum resources will have no benefit for the host state and its people if it remains in its natural condition. But, as stated earlier,

⁹³ See paragraph 2 of Chapter Three below.

⁹⁴ Soros (note 18) at xii.

⁹⁵ Soros (note 18) at xii.

⁹⁶ Soros (note 18) at xii.

⁹⁷ Soros (note 18) at xii. See also Chapter Nine below in respect of corrupt practices.

⁹⁸ See Chapter Nine below.

⁹⁹ See Chapter Nine below.

¹⁰⁰ See for example Stiglitz (note 19) at 18. See also Ross (note 1) at 70, where the author states that “[m]ost people in oil-producing countries seem to recognize that they have a right to benefit from their nation’s mineral wealth. It makes little sense pretend that they do not care.”

host countries need to rely on investors (petroleum companies) to do the exploitation.¹⁰¹ It is therefore important for the petroleum regulatory framework, especially as regards fiscal and financial aspects, to be attractive for investors.¹⁰² Care must be taken that the interests of the host country and its citizens are not pursued to such an extent that the interests of the petroleum companies, who go to great lengths to exploit the resources, are ignored. A petroleum regulatory framework must, therefore, take into account the rights of the citizens of the host country as well as the interests of the petroleum company.¹⁰³ For example, a petroleum company must be rewarded for its efforts in exploring for and producing petroleum. Typically, this reward takes the form of a share in or full ownership of the produced petroleum,¹⁰⁴ which depends on the regime chosen by a state to grant access to petroleum.¹⁰⁵ However, since the citizens of the host nation are the ultimate beneficiaries of the petroleum resources, they must share in the benefit of the petroleum resources. In regimes where the petroleum company acquires ownership of the produced petroleum, a host state will typically ensure that its people benefit in some way by imposing royalties and taxes on petroleum operations.¹⁰⁶ The regulatory framework for petroleum operations may also promote socio-economic empowerment as a means for the host nation to benefit.¹⁰⁷ Merely ensuring financial benefits for the host state is, however, not enough. Petroleum exploitation usually

¹⁰¹ In Namibia, the former Managing Director of the National Petroleum Corporation of Namibia (Pty) Ltd (Namcor) and current Minister of Mines and Energy, Obeth Kandjoze has stated as follows: “For the oil industry a lot of financial, technical, technological and human resources are required. If one of them is lacking, delays are caused. The major oil companies in the world need new oil finds and we need these companies once Namibia strikes oil. It is a delicate balance. They’ve got the know-how, skills and financial resources and it depends on good and sound negotiations as to how Namibia can unlock this new industry to turn the wheel of development.” See Weidlich B “NAMCOR Trying to Turn the Corner” *Insight* March 2013 at 39.

¹⁰² Dale MO “Comparative International and African Mineral Law as Applied in the Formation of the New South African Mineral Development Legislation” in Bastida E, Wälde T and Warden-Fernández J (eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) The Hague Kluwer Law International at 841.

¹⁰³ Hunter (note 36) at 73. The author states that “[a] difficulty facing all States in the exploitation of petroleum resources is balancing the economic interests of oil companies that are crucial for the exploitation of the resources, with the need for the State to capture the appropriate economic returns for the development of its resources. Thus an imperative for any State is to develop a regulatory framework that provides economic incentives for oil companies to exploit petroleum resources, while at the same time capture lasting benefits for present and future generations.” See also Cawood F “Allocation of Petroleum Development Rights in South Africa: A Comparison with Current International Practices” (2006) Research Paper presented as part of LLM, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee at 4.

¹⁰⁴ See for example paragraph 4 of Chapter Three.

¹⁰⁵ See paragraph 4 of Chapter Three and Chapter Five below.

¹⁰⁶ See Chapter Seven below.

¹⁰⁷ See Chapter Eight below.

affects the social fabric of the community where the activities are taking place and often citizen rights are not taken into account or the affected citizens are not consulted properly or at all.¹⁰⁸ It is therefore also in the host nation's interest that its rights are protected, in particular its right to a clean environment¹⁰⁹ and its right to be heard.¹¹⁰

From the above, certain conclusions may be drawn regarding what characteristics a proper regulatory framework for petroleum must contain. A proper regulatory framework for petroleum resources, as Figure 3 below illustrates, is one that balances the interests of the petroleum company with the interests of the host government and its citizens. Furthermore, the regulatory framework must provide for transparency and accountability in the regulation of petroleum resources. By ensuring this trifecta in respect of petroleum regulation, the Namibian and South African governments will be one step closer in ensuring that petroleum exploitation in these two countries operate for the benefit of all parties involved.

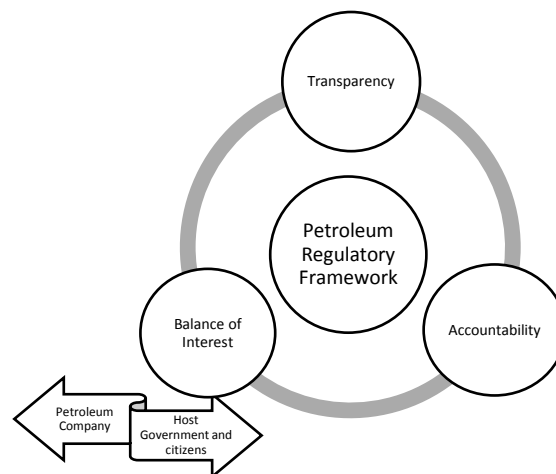


Figure 3: The Model Petroleum Regulatory Framework

The regulatory framework for petroleum in South Africa and Namibia remains largely untested by the courts and by practice.¹¹¹ The potential of petroleum resources in these

¹⁰⁸ Waskow D and Welch C "The Environmental, Social, and Human Rights Impacts of Oil Development" in Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Institute Society at 102.

¹⁰⁹ See Chapter Six below.

¹¹⁰ See Chapter Nine below.

¹¹¹ To date, there are only three major commentaries on South African petroleum law. These are: Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision

two countries creates a need to determine whether the petroleum frameworks in South Africa and Namibia are suitable for petroleum exploitation. In particular, it needs to be ascertained whether the regulatory framework for upstream petroleum resources in South Africa and Namibia reflect the three elements of transparency, accountability and balance of interests. To date, discussions about transformation, black economic empowerment and nationalisation of mines have been dominant, especially in South Africa, but these discussion have not really been driven by express attempts at promoting transparency and accountability within the extractive industries.¹¹² The focus has therefore been predominantly on only one of the factors, namely creating a benefit for the citizens. This is particularly true in respect of the former apartheid-regime – characterised by a “constitutional and policy environment of opacity and non-accountability” – where the interests of a select ruling class were pursued.¹¹³ As this thesis aims to demonstrate, however, all three factors have to be present and equally pursued in a petroleum regulatory regime.

2.2 Legal Comparison

This thesis comprises a comparative analysis of the regulatory framework for petroleum resources in South Africa and Namibia. Namibia and South Africa share a legal history as a result of the shared political history for most of the twentieth century. Briefly, in 1915 the Union of South Africa occupied Namibia (then South-West Africa) and in 1919 South-West Africa became a mandate of South Africa. Roman-Dutch law applied to both countries. Even though Namibia gained independence from South Africa in 1990, pre-independence South African law still applies in Namibia and post-1990 law has persuasive power in Namibia.¹¹⁴

Service 10 2014) Wetton Jutta; Badenhorst P, Mostert H and Dendy M "Minerals and Petroleum" in Joubert WA (ed) *The Law of South Africa* Vol 18 2 ed (2007) Durban LexisNexis Butterworths; and Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* 1 ed (2005, Service Issue 16 2014) Durban LexisNexis Butterworths. There are no commentaries on Namibian petroleum law.

¹¹² Hughes T “South Africa: A Driver of Change” (2012) Working Paper Series, Revenue Watch Institute at 2.

¹¹³ Hughes (note 112) at 3.

¹¹⁴ For a detailed discussion on this topic and its effect on the mineral and petroleum laws of the two countries, see Mostert H and Van den Berg HM “Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences” in Zillman DN, McHarg A, Bradbrook A and Barrera-Hernandez L (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* Oxford Oxford

The shared legal and political histories of these two countries provide a good starting point for a comparative study. It is made all the more interesting and useful by the fact that, while the Namibian legal system has closely followed the South African legal system for the most part, its treatment of its mineral and petroleum resources has always been different from the South African treatment. This is discussed in more detail below.

With South Africa and Namibia surrounded by established and emerging petroleum states (for example, Angola to the north of Namibia and Mozambique north-east of South Africa), international focus is on Namibia and South Africa as potential petroleum countries. In South Africa, for example, the potential of vast sources of shale gas in the Karoo has been heralded as a potential “game changer” for South Africa.¹¹⁵ In fact, since the discovery of oil in the Falklands a few years ago, interest in South Africa as a petroleum destination is at an all time high, with major international oil companies applying for and being allocated offshore blocks in South Africa.¹¹⁶

In Namibia, there has been promising signs of potential offshore oil resources¹¹⁷ with Namibia being viewed as a “new frontier” in the search for oil.¹¹⁸ The oil extracted from the Wingat-1 prospecting well in the Walvis Basin has also been described as a potential game changer for Namibia, as it confirms previous speculation that Namibia

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- University Press at 75 – 97. See also Amoo SK *An Introduction to Namibian Law* (2008) Windhoek MacMillan Education Namibia Publishers (Pty) Ltd at 60 – 61.
- ¹¹⁵ Kings S “Shale Gas Energises Government” *Mail & Guardian* 14 September 2012, available at <http://mg.co.za/article/2012-09-14-00-shale-gas-energises-government> [accessed 25.02.2015]; Donnelly AL “Gas Changes the Energy Landscape” *Mail & Guardian* 30 August 2013, available at <http://mg.co.za/article/2013-08-30-00-gas-changes-the-energy-landscape> [accessed 25.02.2015]; Allix M “Shale Gas can be a Game Changer” *Business Day Live* 24 March 2014, available at <http://www.bdlive.co.za/business/energy/2014/03/24/shale-gas-can-be-a-game-changer> [accessed 25.02.2015]; SANews “Shale Gas Exploration will be a Game Changer, says Zuma” *SANews* 13 February 2014, available at <http://www.sanews.gov.za/south-africa/shale-gas-exploration-will-be-game-changer-says-zuma> [accessed 25.02.2015].
- ¹¹⁶ Planting S “An Energy Game Changer on our Doorstep” *Moneyweb* 27 June 2014, available at <http://www.moneyweb.co.za/moneyweb-south-africa/an-energy-game-changer-on-our-doorstep> [accessed 25.02.2015]; Lo C “Offshore South Africa: Taking a Second Look” *OffshoreTechnology.com* 26 February 2014, available at <http://www.offshore-technology.com/features/featureoffshore-south-africa-taking-a-second-look-4184032/> [accessed 25.02.2015].
- ¹¹⁷ Oredein O “Oil Companies’ Interest Returns to Namibia” *E&P* 25 April 2014, available at <http://www.epmag.com/oil-companies-interest-returns-namibia-715421> [accessed 25.02.2015]; Staff Reporter “A Mine of Different Outlooks” *Insight: Mining in Namibia* 2014 at 3.
- ¹¹⁸ Staff Reporter “Everything Hinges on HRT” *Insight* May 2013 at 30.
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may have offshore oil potential.¹¹⁹ A number of large, international companies have applied for exploration licences, including HRT Oil & Gas, Labreo Petroleo and Petrobras.¹²⁰ Some companies have indicated that they intend to commence drilling by 2016.¹²¹ The Kudu Gas Field is also estimated to hold at least one trillion cubic feet of gas, although the future of this field is uncertain because of the withdrawal of its operator, Tullow Oil PLC.¹²² There has also been an indication of potential hydraulic fracturing in Namibia's future, although geologists hold the view that there is little shale gas potential in Namibia.¹²³

Aside from the above, South Africa's economic and political leadership role within the African continent makes it a key jurisdiction for an African comparison.¹²⁴ On the other hand, and despite its general tendency to follow the South African example, Namibia's treatment of its petroleum resources has for the most part been more in line with international practice than South Africa.¹²⁵ These two jurisdictions – similar as regards their common law roots, but different insofar as it relates to the regulation of petroleum – therefore form the basis of the legal comparison in this thesis.

2.3 Delimitation

This thesis focuses only on petroleum resources. It excludes a thorough discussion of minerals. Despite this, and due to the underdeveloped nature of the petroleum industries in these two countries, brief references will be made to the minerals industry and the regulation of certain aspects of the minerals industry.

Furthermore, this thesis will focus only on the upstream petroleum industry. The concept of "upstream" petroleum industry is discussed in more detail in Chapter Two. Suffice it to say here that scope constraints mean that this thesis can only deal with the

¹¹⁹ Alexander J "Oil Exploration in Namibia" *The Namibian* 21 July 2014, available at http://www.namibian.com.na/indexx.php?archive_id=125865&page_type=archive_story_detail&page=1 [accessed 25.02.2015].

¹²⁰ Titus ID and Van den Berg HM "Namibia" in Picton-Turbervill G (ed) *The International Comparative Legal Guide to: Oil and Gas Regulation 2015* London Global Legal Group Ltd at 272.

¹²¹ Staff Reporter "A Mine of Different Outlooks" *Insight: Mining in Namibia* 2014 at 3.

¹²² Staff Reporter "Tullow, Itochu Pull out of Kudu" *Insight: Mining in Namibia* (2014) at 27.

¹²³ Staff Reporter "Oil and Gas" *Insight* February 2013 at 31.

¹²⁴ Hughes (note 112) at 9.

¹²⁵ See Chapter Four below.

exploration and extraction part of the petroleum industry and not the transport, manufacturing and distribution of petroleum and petroleum products.

The preceding discussion highlighted various economic and political issues in respect of petroleum regulation. From this cross-sweep of the economic and political issues, three issues that have an impact on the efficacy of the legal and regulatory framework emerge. They are: transparency, accountability and the balancing of interests. The research scrutinises the broader legal framework for the upstream petroleum industry in Namibia and South Africa and how these three themes are addressed in the regulatory framework for petroleum resources in South Africa and Namibia. It is therefore a purely legal analysis with reference to how certain policy choices have made their way into the legislation regulating the upstream petroleum industries in South Africa and Namibia. How states use the wealth created by petroleum exploitation is an issue that cannot be addressed in detail in this work, due to its limited scope, but is referred to briefly in Chapter Eight.

3. Historical Background: Petroleum Regulation in South Africa and Namibia

The relationship between the political histories of South Africa and Namibia and development of its mineral and petroleum industries provide an insightful view of the role of the ruling authority in the development of the mineral and petroleum industries of these two countries. The legal histories of South Africa and Namibia have been intertwined for the largest part of the twentieth century and the South African legal system remains a major influence on the Namibian legal system. However, Namibian mineral and petroleum law regime has managed to escape the influence of the often changing South African mineral and petroleum law system. Unlike its South African counterpart, the basic principles of the Namibian mineral and petroleum law regime has remained constant for more than century. The paragraphs below explore why South African mineral and petroleum law has been subject to frequent major fundamental changes, while its Namibian counterpart remained fundamentally unchanged.

The principle of *cuius est solum eius est usque ad caelum et ad inferos* was introduced into South African law via the received Roman-Dutch law brought in along with the

Dutch settlement at the Cape of Good Hope from 1652 onwards.¹²⁶ The implication of this for mineral and petroleum resources on private land was that the owner of the land became the owner of all minerals and petroleum on and below the surface of the land. The Roman-Dutch law remained the common law of South Africa even after the British took control over the Cape of Good Hope in 1765.¹²⁷ For mineral law, the first significant alteration to the Cape's civilian system of law to align it with English practice came in the form of the Sir John Cradock Proclamation of 1813,¹²⁸ which converted all loan farms into freehold or perpetual quitrent holdings and provided that land granted by the Crown would be subject to a reservation to the Crown of the rights to gold, silver and precious stones.¹²⁹ The Proclamation of Sir John Cradock was the first step away from private mineral rights to state-owned mineral rights and paved the way for modification in the exclusivity characteristic, or absoluteness, of mineral rights ownership.¹³⁰ All other minerals (including petroleum) remained vested in the landowner.

Despite the exception under the Sir John Cradock's Proclamation, the general approach under the common law in South Africa was that the owner of the land owned all minerals under the surface of the land in line with the principle of *cuius est solum*.¹³¹ Landowners could permit others to mine the minerals, which was done through

¹²⁶ Dale MO "South Africa: Development of a New Mineral Policy" 1997 (23) *Resources Policy* 15 at 15; *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) at [32]. See also Chapter Three below for a discussion of this principle.

¹²⁷ Davenport TRH and Saunders C *South Africa: A Modern History* 5 ed (2000) New York Macmillan at 40; Hahlo HR and Kahn E *The South African Legal System and its Background* (1968) Cape Town Juta at 575. This was in line with the rule of capitulation as set out in the case of *Campbell v Hall*, which provides that the laws of a conquered country will remain in place until the conqueror decides to change it. See *Campbell v Hall* 1774 1 Comp 204 at 209, 98 ER 1045 at 1047.

¹²⁸ Proclamation on Conversion of Loan Places to Quitrent Tenure (6 August 1813). See Cawood FT and Minnitt RCA "A Historical Perspective on the Economics of the Ownership of Mineral Rights Ownership" 1998 *The Journal of the South African Institute of Mining and Metallurgy* 369 at 370.

¹²⁹ Section 4 of the Proclamation on Conversion of Loan Places to Quitrent Tenure (6 August 1813). See Dale (note 126) 16 and Hahlo and Kahn (note 127) at 576.

¹³⁰ Cawood and Minnitt (note 128) at 370. Many of the white Afrikaners (*boere*) at the Cape were unhappy with the British rule. This resulted in a mass exodus (known as the *Groot Trek*) of the white Afrikaners from the Cape. Between 1834 and 1840, 15,000 persons (called the *Voortrekkers*) left the Cape and travelled inland and to the South and took their slaves with them. New Boer republics were established throughout South Africa, being Natal, Orange Free State and the Transvaal (*Zuid-Afrikaansche Republiek* or ZAR), each with their own legislative powers. See Davenport and Saunders (note 127) at 52 and 80 – 90. Natal was established in 1839, ZAR in 1852 and the Orange Free State in 1854. See Giliomee H *The Afrikaners: Biography of a People* (2003) Cape Town Tafelberg at 166 and 175.

¹³¹ *Minister v Agri South Africa* (note 126) at [34].

contract.¹³² This system, however, severely lacked security of tenure for the miner. The use of contract created various difficulties, since it only created personal rights which could not afford the miner proper security. Furthermore, the lack of separate ownership of minerals made transfer thereof difficult, which further hampered investment.¹³³

The private ownership of minerals, lack of security of tenure for investors and new potential in the minerals industry in South Africa set the stage for development of the minerals regulatory regime.¹³⁴ Because of a lack of mineral and mining law in the Roman-Dutch law system, the South African court and legislature developed a system of mineral rights.¹³⁵ “Mineral rights” were traditionally characterised as “quasi-servitudes”¹³⁶ and entailed the entitlements to go on to the property to which the relate and to search for, sever and remove minerals.¹³⁷

The discovery of diamonds in 1867¹³⁸ and gold in 1886¹³⁹ opened the door for further state interference in the control of minerals.¹⁴⁰ The legislature of the Boer republics (which excluded the Cape of Good Hope, which was still under British control)¹⁴¹ feared that the possible benefits of development of the mineral for the whole community could be curtailed if the landowner had the exclusive right to the minerals.¹⁴² For the legislature in the Boer republics to be in a position to exercise control over minerals, the *entitlements* in respect of mineral rights, ie the rights to search for and extract mineral and petroleum resources, had to be separated from the underlying *mineral rights*. In other words, the entitlement to search for and extract minerals had to be separated from the ownership of the minerals. The legislatures in

¹³² *Minister / Agri South Africa* (note 126) at [34].

¹³³ *Minister / Agri South Africa* (note 126) at [34].

¹³⁴ *Minister / Agri South Africa* (note 126) at [34].

¹³⁵ *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) at 509; *Minister / Agri South Africa* (note 126) at [26].

¹³⁶ *Van Vuren and Others v Registrar of Deeds* 1907 TS 289 at 294.

¹³⁷ *Van Vuren / Registrar* (note 136) at 294; *Trojan / Rustenburg* (note 135) at 509.

¹³⁸ Giliomee H and Mbenga B *New History of South Africa* (2007) Cape Town Tafelberg at 159.

¹³⁹ Giliomee and Mbenga (note 138) at 200.

¹⁴⁰ *Minister / Agri South Africa* (note 126) at [35].

¹⁴¹ In the Cape Colony, the Cradock Proclamation still applied. Rights to precious stones, gold and silver were reserved for the Crown. *Minister / Agri South Africa* (note 126) at [36]; Section 4 of Sir John Cradock’s Proclamation on Conversion of Loan Places to Quitrent Tenure, 1813.

¹⁴² Wessels JW *The History of the Roman-Dutch Law* (1908) Grahamstown African Book Company 486 – 487; Dale (note 126) at 16.

the Boer republics attempted to exercise some control over the mineral entitlements through various enactments which intended to protect and reward the interests of private enterprises, but at the same time impose a system of state control over the mining industry.¹⁴³ The treatment of minerals depended on the province in which it was situated, the type of minerals and whether the minerals were found on or under private land or state / crown land.¹⁴⁴ None of these legislative measures expressly dealt with petroleum, with the exception of the Mineral Law Amendment Act 16 of 1907 of the Cape of Good Hope, which included natural gas and oil under the definition of “base mineral”.¹⁴⁵

The gist of the common-law system of mineral rights is that the ownership remained vested in the landowner. Once the holder removes the minerals, it became his property.¹⁴⁶ The legislature’s policy regarding the exploitation of the mineral resources of the area fell between the two absolutes of complete state monopoly and unencumbered private enterprise.¹⁴⁷ The state’s policy was to promote the prospecting and exploitation of the country’s mineral wealth¹⁴⁸ and this was achieved either by reserving the *mineral rights* for the state, or by reserving the *mineral entitlements* for the state.¹⁴⁹ This treatment of minerals was based on the desire to ensure a greater benefit for the nation as a whole from its mineral wealth.

After its victory in the Anglo-Boer War, Britain had control over all four provinces and established the Union of South Africa. The colonial mining legislation remained in force in the Provinces after the Union of South Africa was formed in 1910.¹⁵⁰ As with

¹⁴³ Wessels (note 142) 487. See also Dale (note 126) at 16. The legislation included: Law 1 of 1871 (Transvaal), the Precious Stones and Minerals Mining Act 19 of 1883 (Cape), the Precious Minerals Act 31 of 1898 (Cape), the Mines and Collieries Act 43 of 1899 (Natal), the Mineral Law Amendment Act 16 of 1907 (Cape) and the Precious and Base Metals Act 35 of 1908 (Transvaal).

¹⁴⁴ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) Durban Butterworths 1; Mostert (note 80) at 26 – 44.

¹⁴⁵ Section 33 of the Mineral Law Amendment Act 16 of 1907 (Cape). It may be argued, however, that the Mines and Collieries Act 43 of 1899 of Natal could have included petroleum, as “minerals” were defined in this Act as “[a]ll substances which can be extracted from the earth by mining operations for the purpose of profit...”

¹⁴⁶ *Trojan / Rustenburg* (note 135) at 509.

¹⁴⁷ Franklin and Kaplan (note 144) at 1.

¹⁴⁸ Franklin and Kaplan (note 144) at 1.

¹⁴⁹ Badenhorst and Mostert (note 111) at 1-16 – 1-27. See also *Minister / Agri South Africa* (note 126) at [35] – [52].

¹⁵⁰ Section 123 of the South Africa Act of 1909. This section conferred all mining and mineral rights on the Governor-General-in-Council. See Franklin and Kaplan (note 144) at 1.

the colonial era, the extent of state control over mineral resources in the union varied according to the nature of the mineral in question and according to the province in which mining operations were conducted.¹⁵¹ The Union era, however, saw the first separate treatment of petroleum. Because the prospects of commercial quantities of natural oil in the Union of South Africa were unfavourable, the Natural Oil Act 46 of 1942 was promulgated in an attempt to encourage and control the exploitation of natural oil.¹⁵² This Act vested the right to prospect and mine for natural oil in the state, although ownership of natural oil remained vested in the landowner.¹⁵³ Under this Act, only the state had the right to prospect for and mine natural oil, not the holder of the mineral rights, but the state could grant prospecting and mining leases for natural oil.¹⁵⁴ This Act was therefore the first provision in South Africa to reserve the right to exploit natural oil for the state.

Even with the extensive regulation of the rights to prospect and mine, the mineral and petroleum rights remained vested in the owner of the land. The owner thus still remained the owner of the unsevered minerals and petroleum as well, but his entitlements flowing from this ownership were separated from the mineral and petroleum rights in most instances and were controlled by the state. The colonial and Union eras were also marked by a refusal to acknowledge the claims of black people or indigenous communities to land and minerals, a thorough discussion of which is beyond the scope of this thesis. The statutory institution of racial segregation and recognition of group areas only reinforced the exclusion of black people and indigenous communities from mineral exploitation.¹⁵⁵

When the Union of South Africa became the Republic of South Africa in 1961, all laws in force in any part of the Union of South Africa remained in force until they were repealed or amended.¹⁵⁶ New legislation regarding mining and mineral rights was

¹⁵¹ Hahlo and Kahn (note 127) at 764.

¹⁵² Hahlo and Kahn (note 127) at 770.

¹⁵³ Section 2 of the Natural Oil Act 46 of 1942.

¹⁵⁴ Section 4 and section 5 of the Natural Oil Act 46 of 1942; Hahlo and Kahn (note 127) at 770.

¹⁵⁵ See Mostert (note 80) at 30 – 35. The Natural Oil Act 46 of 1942 did not apply to areas of land scheduled as native areas of release areas in terms of the Native Trust and Land Act 18 of 1936. See section 14 of the Natural Oil Act 46 of 1942.

¹⁵⁶ Section 107 of the Republic of South Africa Constitution Act 32 of 1961. According to section 113 of this Act, all the rights vested in the Governor-General are transferred to the State President. See Franklin and Kaplan (note 144) at 1.

passed by the National Party government.¹⁵⁷ The Natural Oil Act was one of the legislative measures repealed. The regulation of petroleum was reincorporated under the legislation dealing with minerals, being the Mining Rights Act 20 of 1967. This Act also reserved the right to prospect for and to mine natural oil for the state, who could grant prospecting leases in respect of natural oil to persons.¹⁵⁸ Under this new legislation, the ownership of unsevered minerals and petroleum remained vested in the surface owner, while rights to minerals and petroleum could be separated from the dominium of the land, as was done with natural oil.¹⁵⁹ Prospecting and mining leases could be granted by the state to private entities in respect of natural oil.¹⁶⁰

The discriminatory trend of the colonial and Union eras continued during the Republic era.¹⁶¹ The Minerals Act 50 of 1991, which came into force in January 1992,¹⁶² was a product of the National Party government's policy of privatisation¹⁶³ and attempted to restore the common law rights of the holder.¹⁶⁴ According to this Act, mineral rights vested in the state were repealed and the common law rights of the holder of the mineral right were restored.¹⁶⁵ The state was treated as equal to any other holder of mineral rights.¹⁶⁶ The Minerals Act did not deal specifically with petroleum.¹⁶⁷

Although the state no longer reserved mineral rights for itself, it still had some form of control over mineral rights. The Minerals Act introduced a system of authorisations

¹⁵⁷ The four most important acts are the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967.

¹⁵⁸ Section 2(1)(a) and section 14 of the Mining Rights Act 20 of 1967.

¹⁵⁹ See Franklin and Kaplan (note 144) at 5 footnote 8 and 6; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5 ed (2006) Durban LexisNexis Butterworths 693 – 694; section 2(1)(a) of the Mining Rights Act 20 of 1967.

¹⁶⁰ Section 14 and section 25(1)(g) of the Mining Rights Act 20 of 1967.

¹⁶¹ See Mostert (note 80) at 51 – 53. So, for example, a prospecting permit could not be granted to any coloured person except in respect of any state land in the province of the Cape of Good Hope or private owned by a coloured person. A prospecting permit could also not be granted to any black person except in respect of private land of which the South African Development Trust or a black person was the owner or which was held in trust for a black person. See sections 7(3)(b) and 7(3)(c) of the Mining Rights Act 20 of 1967.

¹⁶² Proclamation 123 of Government Notice 13682 of 20 December 1991.

¹⁶³ See White Paper on Privatisation and Deregulation in the Republic of South Africa (1987).

¹⁶⁴ Badenhorst PJ "The Revesting of State-held Entitlements to Exploit Minerals in South Africa: Privatisation or Deregulation?" 1991 *TSAR* 113 at 113.

¹⁶⁵ This was achieved by means of section 5(1) of the Minerals Act 50 of 1991.

¹⁶⁶ Badenhorst (note 164) at 124.

¹⁶⁷ In terms of section 44(1)(a) of this Act, prospecting leases in respect of natural oil granted under the previous legislation remained in force. The lease was deemed to be a prospecting permit. Section 44(1)(b).

over mineral rights. No person could prospect or mine for any mineral without the necessary authorisation granted to him in accordance with the act.¹⁶⁸ With this system of authorization, the state neither held the mineral rights, nor the entitlements flowing from the mineral rights.

Shortly after the promulgation of the Minerals Act of 1991, a debate about the future of the South African mining industry arose in light of the political changes facing South Africa.¹⁶⁹ Nationalisation of the South African mineral law system was both foreseen and proposed early in the 1990's.¹⁷⁰ The first Mineral Development Draft Bill was published for public comment in 2000,¹⁷¹ followed by a substantially revised Mineral and Petroleum Resources Development Act 28 of 2002 was approved and came into operation on 1 May 2004.¹⁷²

In Namibia,¹⁷³ the earliest indications of mining dates back to the fifteenth century.¹⁷⁴ Mineral rights belonged to the communities within whose territories the ore deposits

¹⁶⁸ Section 5(2) of the Minerals Act 50 of 1991.

¹⁶⁹ Badenhorst PJ et al "Proposed Nationalisation of Mineral Rights in South Africa" 1994 (12) *Journal of Energy and Natural Resources Law* 287 at 287.

¹⁷⁰ Badenhorst PJ *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (1992) University of Pretoria LLD 311 – 312; Badenhorst (note 169) 287. The historical roots of this idea of nationalisation can be traced back to the ANC Freedom Charter of 1955. This charter provided that "[t]he mineral wealth beneath the soil ... shall be transferred to the ownership of the people as a whole." See The Freedom Charter (26 June 1955) available at <http://www.anc.org.za/show.php?id=72> [accessed 11.04.2015].

¹⁷¹ Government Notice 4577 of *Government Gazette* 21840 of 18 December 2000. The constitutionality of this Bill was questioned by certain scholars, especially as regards the omission of provisions relating to compensation where existing rights are infringed. See Badenhorst PJ and Malherbe R "The Constitutionality of the Mineral Development Draft Bill 2000 (part 1)" 2001 (3) *TSAR* 462 and Badenhorst PJ and Malherbe R "The Constitutionality of the Mineral Development Draft Bill 2000 (part 2)" 2001 (4) *TSAR* 765.

¹⁷² Proclamation 25 of 2004, *Government Gazette* 26264 of 23 April 2004. See Chapter 3 for a discussion of this act.

¹⁷³ Namibia was initially known as Transgariep, or land beyond the Gariep. Gariep was a Hottentot name for the Orange River. Early explorers also called it Namaland, Damaraland and Ovamboland. Swedish explorer Charles John Andersson was the first person to call it South West Africa, a mere descriptive name. During German colonial rule, the area was known as German South West Africa. After South Africa took control over German South West Africa under mandate of the United Nations in 1920, the area was officially known as South West Africa. See Levinson O *South West Africa* (1976) Cape Town Tafelberg at 6.

¹⁷⁴ Evidence shows that already at that stage, copper has been mined, smelted and traded by the natives for at least a couple of hundred years. Dierks K *Chronology of Namibian History: From Pre-Historical Times to Independent Namibia* 2 ed (2002) Windhoek Namibia Scientific Society 5.

were found and exploitation of such minerals was regulated by the chief or ruler of the community.¹⁷⁵

Early mining rights were obtained from local inhabitants by German traders through negotiation.¹⁷⁶ Near the end of the 1880's, the first semi-precious stones were discovered at the Kleine Spitzkoppe.¹⁷⁷ In early 1888, the Mining Ordinance of 25 March 1888 was promulgated under the guidance of German mining law.¹⁷⁸ This was the first attempt at central regulation of mining activities within South-West Africa¹⁷⁹ and vested all mining rights in the *Deutsche Kolonialgesellschaft für Südwest-Afrika* under the supervision of the German Empire.¹⁸⁰ At the same time, gold deposits are discovered near Walvis Bay.¹⁸¹

On 15 August 1889, a new mining ordinance was promulgated which vested all mining rights in the Imperial Mining Office.¹⁸² The same principle underlines all mining legislation enacted after this ordinance up until now,¹⁸³ with the exception maybe of the third mining ordinance.¹⁸⁴

¹⁷⁵ Bomani MD and Duggal NK *Namibia: Legal Framework and Development Strategy Options for the Mining Industry* Namibia Studies Series (1987) United Nations Institute of Namibia 64.

¹⁷⁶ In 1883, a German trader arrived in Namibia as an agent for businessman F.A.E. Lüderitz. After lengthy negotiations with the Nama chief Joseph Frederick of Bethanie, Lüderitz received the rights over the area surrounding Angra Pequena. All mining rights over this area were included in the sale. This settlement was later renamed Lüderitzbucht (now known as Lüderitz) and opened the area to German economic and political interests. This also led to the establishment of German colonial rule in 1884, as more land was bought from and protective treaties signed with the local tribes. See Cockram G-M *South-West African Mandate* (1976) at 9. Cockram G-M *South-West African Mandate* (1976) South African Institute of International Affairs at 9; Dierks (note 174) at 57; Hahlo HR "The Great South-West African Diamond Case: A Discourse" 1959 (76) *SALJ* 151 at 152 – 153; Katjavivi PH *A History of Resistance in Namibia* (1988) Paris Unesco Press at 7.

¹⁷⁷ Dierks (note 174) at 68.

¹⁷⁸ Bomani (note 175) at 65.

¹⁷⁹ Bomani (note 175) at 65.

¹⁸⁰ Hahlo (note 176) at 155.

¹⁸¹ Dierks (note 174) at 66.

¹⁸² In terms of the Imperial Mining Ordinance of 15 August 1889, the Imperial Mining Office could grant prospecting and mining permits to members of the public. Hahlo (note 176) at 155.

¹⁸³ Dierks (note 174) at 67.

¹⁸⁴ The Imperial Mining Ordinance for German South-West Africa of 8 August 1905. It is based on the General Prussian Mining Act of 1865 (*Bergbaugesetz*) and established the principle of mining freedom. Title to all minerals vested in the Imperial Government, but a general right to prospect for precious and base metals anywhere in South-West Africa was granted to all persons, except "natives and coloureds". See Dierks (note 174) at 123; Hahlo (note 176) at 155; Bomani (note 175) at 66.

German rule over South-West Africa continued until 1915 when South African forces, acting on the request of the British Government, invaded South-West Africa and took control of the capital, Windhoek and the country was run under martial law.¹⁸⁵ Control of minerals and the mineral industry was entrusted to the South African Government.¹⁸⁶ In 1919 South-West Africa became a mandate of South Africa.¹⁸⁷ Section 1(1) of Proclamation 21 of 1919 stated that the Roman Dutch law will apply in South-West Africa as well.¹⁸⁸ The period of martial law ended on 1 January 1921 when the League of Nations Mandate took effect.¹⁸⁹

The regulatory system formulated by the Imperial Mining Decree of 1905 remained in force until 1954.¹⁹⁰ The Mines, Works and Minerals Ordinance 26 of 1954 consolidated all mineral legislation in the territory and established a full Mines Division.¹⁹¹ This Ordinance included natural oil and natural gas under the definition of

¹⁸⁵ Katjavivi (note 176) at 13. Martial law over German South-West Africa was declared by the Proclamation of Martial Law 15 of 1915. The legal measures taken during the period of martial law were ratified by Proclamation 1 of 1921. German laws remained in force during the period of martial law, unless they were specifically repealed. Although the former German administrative system was abolished, both the German Civil Code and the German Criminal Code remained in force. See Du Pisani A *SWA / Namibia: The Politics of Continuity and Change* (1986) Johannesburg J. Ball Publishers at 47; Naldi GJ *Constitutional Rights in Namibia* (1995) Kenwyn Juta at 1.

¹⁸⁶ Bomani (note 175) at 66.

¹⁸⁷ This was in accordance with section 22 of the League of Nations Covenant. The Mandate was given effect to by the Treaty of Peace and South-West Africa Mandate Act 49 of 1919. After South-West Africa became a Mandate, Act 49 of 1919 delegated the administration of South-West Africa to the Governor-General of South Africa. According to Proclamation 1 of 2 January 1921, these administrative powers were further delegated to the Administrator of South-West Africa. See Naldi (note 185) at 2.

¹⁸⁸ Section 1(1) reads as follows: "The Roman Dutch Law as existing and applied in the Province of the Cape of Good Hope at the date of the coming into effect of this Proclamation shall, from and after the said date, be the Common Law of the Protectorate, and all Laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this Section, be repealed." Through this Act, the South African Union Government was authorised to do such things as might be proper or expedient for giving effect to any mandate that might be issued with regard to South-West Africa and to issue any necessary proclamation and regulations. The Act further provided that the grant of minerals, amongst other thing, may not be dealt with without the specific authority of the Union Parliament. See Emmett E "The Mandate over South-West Africa" 1927 (9) *Journal of Comparative Legislation and International Law* 111 at 117 – 118.

¹⁸⁹ Katjavivi (note 176) at 13.

¹⁹⁰ The Imperial Mining Ordinance was amended by Proclamation 24 of 1919, Proclamation 59 of 1920, Proclamation 11 of 1923 and the Mining Rights (SWA) Act 26 of 1932. The lastmentioned act validated all rights and titles held in terms of the Imperial Mining Decree. See Bomani (note 175) at 68.

¹⁹¹ Bomani (note 175) at 68.

mineral.¹⁹² This Ordinance was replaced by the Mines, Works and Minerals Ordinance 20 of 1968, which interestingly included a separate definition of natural oil, but did not deal with natural oil in the text.¹⁹³

After Namibia gained independence in 1990, the legislature quickly enacted new mining legislation to replace the colonial legislation.¹⁹⁴ The legislature also opted for treating petroleum resources in a different statute, namely the Petroleum (Exploration and Production) Act 2 of 1991.

From the brief historical overview set out above, it is clear that legislative attention in South Africa and Namibia focussed mainly on minerals, with only brief references to petroleum. The reason for this is because the prospects of viable quantities of petroleum in South Africa and Namibia has mostly been bleak. The discriminatory practices in the legislation has, however, been applied (mostly theoretically) to petroleum as well; this clearly shows a lack of proper transparency, accountability and interest balancing in the way petroleum was historically regulated in these two countries. The benefit that minerals (and possibly petroleum) could hold for citizens was not applied equally to all citizens. In the light hereof, the current legislative environment deals expressly with petroleum, emphasising specifically ways in which past injustices are envisioned to be remedied – in South Africa more so than in Namibia.

3. Practical Significance of Research

Neither of the countries under examination have been major players in the global petroleum industry, but there are indications of potentially viable petroleum resources

¹⁹² Section 1 of the Mines, Works and Minerals Ordinance 26 of 1954, *sv* “mineral”.

¹⁹³ The only other reference to natural oil is in section 1(2), which states that “[t]he right of prospecting and mining for and disposing of base minerals, excluding natural oil and source material, in any Native reserve is vested in the South African Bantu Trust.” The Mines, Works and Minerals Ordinance 26 of 1954 also exhibited the same discriminatory practices than the South African legislation. Under this Ordinance, a prospecting licence may only be granted to companies and natural persons of European descent, except that in the Rehoboth Gebiet, burgers of the Rehoboth Baster Community, and in native reserves, natives lawfully resident therein possessed the same rights and were subject to the same obligations than Europeans. The Mines, Works and Minerals Ordinance 20 of 1968 contained a similar provision. Section 22(1) of the Mines, Works and Minerals Ordinance 26 of 1954 and section 21(1) of the Mines, Works and Minerals Ordinance 20 of 1968.

¹⁹⁴ Ministry of Mines and Energy “2001” White Paper on Mining and Minerals *MME Newsletter* 1 at 1.

in Namibia and South Africa.¹⁹⁵ Since both South Africa and Namibia's petroleum laws are (still) underdeveloped, as the need for sophisticated frameworks had not arisen in the past, there have not been proper judicial or practical opportunities to test the legislative frameworks for petroleum resources yet. For example, the recent controversy caused by Shell's proposed use of hydraulic fracturing in the Karoo illustrates the dilemma faced by the South African state in the regulation of petroleum resources. On the one hand, petroleum companies are interested in exploiting the potential shale gas reservoirs of South Africa.¹⁹⁶ On the other hand, the local residents vehemently object to the use of hydraulic fracturing, arguing that it will *inter alia* damage the environment and waste precious water resources.¹⁹⁷ The entire debacle is characterised by misinformation, and reliance on fear tactics, or deflection of important questions. This situation illustrates the difficulties faced in the regulation of petroleum resources: balancing the rights and interest of the petroleum company with the rights and interest of the nation.

If viable quantities of petroleum resources exist in South Africa and Namibia, these two countries need to attract investors to exploit these resources. As petroleum exploitation is at such an early stage in the countries under scrutiny, it is an opportune time to evaluate the current framework for petroleum resources in South Africa and Namibia and to evaluate how it balances the rights of petroleum companies with the rights of the respective nations.

4. Inquiry Outline

The purpose of this thesis is to determine and define the regulatory framework for the exploitation of petroleum resources in South Africa and Namibia and to evaluate

¹⁹⁵ Clarke (note 10) at 340 and 347.

¹⁹⁶ Early in 2011, Royal Dutch Shell ("Shell") applied for exploration rights in the Karoo to explore for shale gas (PASA Reference No. 12/3/219; PASA Reference No. 12/3/220; PASA Reference No. 12/3/221). The applications cover three areas, Western Karoo, Central Karoo and Eastern Karoo.

¹⁹⁷ Cropley E "Karoo Fracking: Water, Wealth and White" 28 October 2013 *Mail and Guardian* available at <http://mg.co.za/article/2013-10-28-karoo-fracking-water-wealth-and-whites> [accessed 02.02.2014]; SAPA "Fracking Threatens Karoo Water Reserves: Conservationists" 06 September 2013 *Times Live* available at <http://www.timeslive.co.za/scitech/2013/09/06/fracking-threatens-karoo-water-reserves-conservationists> [accessed 02.02.2014]; Karoo Space "Threat of Fracking Unites Karoo Communities" available at <http://karoospace.co.za/threat-of-fracking-unites-karoo-communities/> [accessed 02.02.2014].

whether it can balance the interests of petroleum companies with the interests of the people of South Africa and Namibia. As stated above, this thesis looks at the broader legal framework for the upstream petroleum industry in Namibia and South Africa and how the three themes of transparency, accountability and balance of interest are addressed in the regulatory framework for petroleum resources in South Africa and Namibia.

To facilitate a discussion on the regulatory framework for petroleum in South Africa and Namibia, this thesis is divided into three parts. The first part provides a general overview of selected components of the upstream petroleum industry. This part begins by providing some technical detail regarding petroleum and petroleum exploitation. An overview of the basic principles of petroleum exploitation is essential to evaluate the framework for petroleum exploitation. Petroleum law in South Africa and Namibia is a relatively unexplored area. As certain aspects of petroleum regulation are technical, attempts at discussing the purely legal aspects thereof will be sterile unless accompanied by some background information. Accordingly, this thesis begins with a short discussion of the basic aspects of petroleum and petroleum exploitation. The first part of the thesis also deals with the basic principles of ownership of, control over and access to petroleum resources, as developed internationally.

In the second part, the law and practice of the upstream petroleum industry in South Africa and Namibia is discussed with specific reference to the influence of the constitution and the role of the state in the regulation of petroleum resources in South Africa and Namibia. Here, the ownership of and control over petroleum resources is discussed and an attempt made at defining the role of the state in respect of petroleum exploitation. This third part of the thesis then moves on to a discussion of the regulation of petroleum in South Africa and Namibia. First, the primary legislation dealing with petroleum is discussed. The topics covered here are the meaning of petroleum and the nature and content of rights to petroleum are discussed. It is important for transparency and accountability to have a clear and unambiguous system in place for ownership of and control over petroleum resources. A thorough understanding of the nature and content of access to petroleum is, however, also important to determine whether a balance between the interests of the petroleum company and the interests of the host nation is struck. The discussion of the regulatory

framework for petroleum resources is further amplified by three chapters dealing with the secondary regulation of petroleum, namely environmental aspects, fiscal aspects and socio-economic empowerment.

The second part of the thesis is concluded with a discussion focusing on the extent and limitations on the states' control over petroleum resources. The control that the South African and Namibian states exercise over petroleum resources is curtailed by the constitutional right of every person to just administrative action, the right to information and the criminalisation of bribery and corruption. The discussion here is important in view of the problems of lacking transparency and insufficient accountability that feature so strongly in the international petroleum community. By entrenching a constitutional right to just administrative action, providing for a right to information and criminalising bribery and corruption, the South African and Namibian petroleum industries already show more transparency and accountability than some of its international counterparts.

The conclusion contains an evaluation of the regulatory framework for petroleum resources in South Africa and Namibia. It looks specifically at whether a balance is struck between the interests of petroleum companies and the interests of the people of South Africa and Namibia. Recommendations are made as to how the regulatory framework for petroleum exploitation of each country may be changed or amended to ensure a greater benefit for the host countries without running the risk of losing potential investors.

PART A:

CONTEXT: SELECTED COMPONENTS OF THE UPSTREAM PETROLEUM INDUSTRY

The first part of this thesis deals with the basic aspects of petroleum extraction and the upstream petroleum industry. Rather than providing a detailed exposition of the geology and occurrence of petroleum and all aspects of the upstream petroleum industry, the following chapters comprise a discussion of issues selected because of their fit to the central question about improvement of the regulatory and legislative framework. The aspects discussed are: the division of the petroleum industry; petroleum geology and occurrence; the petroleum exploitation process; general principles of ownership of petroleum resources; and the allocation of rights to petroleum.

Chapter Two:

BASIC OVERVIEW OF PETROLEUM AND THE PETROLEUM EXPLOITATION PROCESS

1. Introduction

Petroleum legislation often employ technical industry terms without properly defining them.¹ To appreciate the framework and substance of the legislation and to evaluate it properly, some basic understanding of the technical aspects of petroleum and the petroleum exploitation process is needed. This chapter provides a very basic discussion of the technical aspects of petroleum exploitation. This will give further content to the statutory framework for petroleum exploitation and will assist in the evaluation thereof. This chapter also reviews the basic principles to be understood in examining petroleum exploitation. It considers the divisions in the petroleum industry briefly and provides a short overview of the geology and occurrence of petroleum. It then proceeds to a discussion of the petroleum exploitation process, including the exploration and production processes. Namibian and South African examples illustrate how these basic principles apply in the two jurisdictions being examined, paving the way for more detailed discussion subsequently.

¹ For example, in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, a production right is required for production operations. The Act defines “production operation” as “any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum”. Similarly, in terms of the Namibian Petroleum (Exploration and Production) Act 2 of 1991, a production licence is required when a company intends to conduct production operations, which this Act defines as “any operations carried out for or in connection with the production of petroleum”. Clearly, a layperson cannot, from this, know with certainty when a production right is required. Some knowledge of production operations beyond the Mineral and Petroleum Resources Development Act 28 of 2002 is required.

2. The Division of the Petroleum Industry

The petroleum industry is typically divided into three streams: upstream, midstream and downstream.² The upstream petroleum industry deals with the exploration for and production of petroleum resources.³ More specifically, it involves the searching for and extraction of petroleum,⁴ which includes the drilling of exploratory wells and the subsequent operating of the well to bring the petroleum to the surface.⁵

Once petroleum is recovered and brought to the surface, it is transported by ship tanker, pipeline, railcar tanker or truck tanker to a refinery.⁶ This is referred to as the midstream petroleum industry.⁷ This stream also deals with the marketing and transport of recovered petroleum resources.⁸ Petroleum in its crude form, however, is not of much use. Crude oil and natural gas must still be refined and the products derived from such refining sold as petroleum products. The downstream petroleum industry involves the refining and manufacturing of petroleum into a marketable product,⁹ such as petrol, diesel fuel, jet fuel, propane and asphalt.¹⁰

The upstream, midstream and downstream sectors of the petroleum industry are generally regulated separately.¹¹ Most petroleum companies operate only in one of the three streams.¹² A company that operates in all three streams is referred to as a

² Downey M *Oil 101* (2009) La Vergne Wooden Table Press LLC at 62.

³ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 34-1; Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* 1 ed (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at 481; Downey (note 2) at 62.

⁴ See Downey (note 2) at 62.

⁵ Trencome “Petroleum Industry” available at <http://www.trencome.com/petroleumindustry.htm> [accessed 03.02.2014].

⁶ See Downey (note 2) at 74.

⁷ Downey (note 2) at 62; Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.10.

⁸ Trencome (note 5).

⁹ See Downey (note 2) at 74.

¹⁰ Trencome (note 5).

¹¹ So, for example, the downstream petroleum industries in South Africa and Namibia are dealt with by the Petroleum Products Act 120 of 1977 and the Petroleum Products and Energy Act 13 of 1990 respectively. In South Africa, the midstream petroleum industry is partly regulated by the Petroleum Pipelines Act 60 of 2003. See also Alramahi (note 7) at §1.10.

¹² See Downey (note 2) at 62.

vertically integrated company.¹³ Figure 4 below is a representation of the different streams of the petroleum industry.



Figure 4: Division of the Petroleum Industry

The focus of this thesis is only on the regulation of the upstream petroleum industry, that is the regulation of the exploration and production of petroleum. Within this industry stream, South Africa is at a much more advanced stage than Namibia. In Namibia, most petroleum exploration takes place offshore. No commercial oil discoveries have so far been made. There is one declared gas field (the Kudu Gas Field), in the south-western offshore part of Namibia. A production licence has been issued in respect of this area.¹⁴ Many exploration licences (all mainly for offshore exploration) have been issued, and exploration activities are on the increase; so far fifteen exploratory wells have been drilled.¹⁵ Figure 2 in the preliminary pages shows the current exploration and production licences in Namibia.

¹³ See Downey (note 2) at 62.

¹⁴ See Ministry of Mines and Energy *Petroleum Exploration and Production* <http://www.mme.gov.na/energy/upstream.htm> [accessed 19.10.2014].

¹⁵ Ministry of Mines and Energy *Petroleum Exploration and Production* <http://www.mme.gov.na/energy/upstream.htm> [accessed 19.10.2014].

In South Africa, on the other hand, over three hundred exploratory wells have been drilled offshore; gas and condensate were discovered as far back as 1969;¹⁶ some small oil and gas fields identified and some commercial production took place.¹⁷ There are two undeveloped gas fields and a further six gas discoveries in the Pletmos Basin and one oil and several gas discoveries have been made in the South African part of the Orange Basin.¹⁸ Figure 1 in the preliminary pages shows the current exploration and production activities in South Africa.

3. Petroleum Geology and Occurrence

Before the more technical provisions of the upstream petroleum industry is discussed, it is necessary briefly to discuss petroleum geology and occurrence. This is also necessary for a discussion of the regulatory aspects of petroleum. Legislatures generally accept that a substance qualifies as petroleum if two requirements are met: firstly, it must be a hydrocarbon, whether solid, liquid or gaseous; secondly, it must occur naturally.¹⁹ This is certainly the baseline accepted in South Africa and Namibia.²⁰ Accordingly, classification of petroleum sources as conventional or unconventional may have implications for the manner in which legal frameworks can regulate their extraction. Similarly, occurrence patterns influence the applicability of legislation. This section contains a brief explanation of petroleum geology and occurrence.

3.1 Geology

As primary sources of energy, hydrocarbons are used as combustible fuel sources. They are organic compounds of hydrogen and carbon that may exist in a solid, liquid or gaseous states, depending on molecular composition, pressure and prevailing reservoir temperature.²¹ Natural or crude oil is a liquid hydrocarbon; natural gas a gaseous

¹⁶ Petroleum Agency SA *History of Exploration and Production* <http://www.petroleumagency.co.za/index.php/petroleum-geology-resources/exploration-history> [accessed 19.10.2014].

¹⁷ E.g. from the Bredasdorp Basin. Petroleum Agency SA (note 16).

¹⁸ Petroleum Agency SA (note 16).

¹⁹ See the discussion of the statutory meaning of petroleum in Chapter Five below.

²⁰ See Chapter Five below.

²¹ Taverne B *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* 2 ed (2008) at 1; Lowe JS *Oil and Gas Law in a Nutshell* 5 ed (2009) at 1.

hydrocarbon.²² Crude oil found in natural gas reservoirs are known as condensates. Reservoirs sometimes produce liquid natural gas (“LNG”), i.e. lighter liquid hydrocarbons, such as propane and butane.²³

In a strict sense, the term “petroleum” refers only to naturally occurring liquid hydrocarbon, i.e. natural oil.²⁴ In a wider sense, the term “petroleum” includes all naturally occurring solid hydrocarbons (tar, asphalt), liquid hydrocarbons (natural oil or crude oil) or gaseous hydrocarbons (natural gas).²⁵ “Unconventional petroleum” (misguidingly) does not refer to petroleum not occurring in its natural state, but rather is an indication of *where* the petroleum is found (i.e. in unconventional sources) and *how* it is produced (i.e. through unconventional methods: methods other than drilling). “Unconventional” petroleum resources include, for example, bitumen, which is not drilled, but mined from sand, sandstone or other sedimentary rocks.²⁶ It also includes shale gas, which is recovered through the method of hydraulic fracturing.

²² Lowe (note 21) at 1. Natural gas can be generated in association with some type of oil (in which case it is classified as ‘associated’ natural gas) or in association with coal (in which case it is classified as ‘non-associated’ natural gas). The adjective “natural” distinguishes hydrocarbons that exist in natural conditions from “manufactured” hydrocarbons²² or “unconventional” hydrocarbons. See also Taverne (note 21) at 1.

²³ Roberts J “A Primer on Oil” in Tsalik S and Schiffman A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Society Institute at 32.

²⁴ Petroleum comes from the Greek *petro*, which means rock, and *oleum*, which means oil. Hyne NJ *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production* 2 ed (2001) at 1. Narrow definitions are found in MacDonald JG, Burton CJ, Winstanley I and Lapidus D *Collins Dictionary of Geology* Revised 1 ed (2003) London HarperCollins Publishers at 337 which describes petroleum as “a naturally occurring complex liquid hydrocarbon that, after distillation and the removal of impurities such as nitrogen, oxygen and sulphur, yields a variety of combustible fuels”. The Glossary of Geology published by the American Geological Institute defines petroleum as “a naturally occurring complex liquid hydrocarbon, which after distillation and removal of impurities yields a range of combustible fuels, petrochemicals, and lubricants”. See Neuendorf KKE, Mehl JP and Jackson JA (eds) *Glossary of Geology* 5 ed (2005) Alexandria American Geological Institute at 485. Allaby M (ed) *Oxford Dictionary of Earth Sciences* 3 ed (2008) Oxford Oxford University Press at 431 defines petroleum as “naturally occurring liquid hydrocarbons formed by the anaerobic decay of organic matter”.

²⁵ Neuendorf et al (note 24) at 485; MacDonald et al (note 24) at 337. See also Jones C (ed) *Illustrated Dictionary of Geology* (2010) New Delhi Lotus Press at 143, where petroleum is defined as “any of a group of naturally occurring substances made up of hydrocarbons. These substances may be gaseous, liquid, or semi-solid.” See also Taverne B *An Introduction to the Regulation of the Petroleum Industry: Laws, Contracts and Conventions* International Energy and Resources Law and Policy Series (1994) London Graham & Trotman Limited at 1 and Omorogbe Y *Oil and Gas Law in Nigeria* (2003) Lagos Malthouse Press Limited at 1.

²⁶ Roberts (note 23) at 33.

3.2 Occurrence

The legislative frameworks for upstream petroleum resources scrutinised in this thesis only applies to petroleum resources occurring naturally.²⁷ A proper understanding of the natural occurrence of petroleum is important in dealing with the applicability of legislation to the upstream petroleum industry.

Petroleum resources found in unconventional sources or requiring unconventional methods of production should be considered as petroleum occurring naturally for purposes of the legislative framework regulating upstream petroleum resources. If shale gas, for instance, were to be understood not to fall within the purview of the definition of a petroleum resource in South Africa, it would have implications for the manner in which this gas may be extracted. The unconventional method for capturing shale gas has already induced one South African commentator to opine that shale gas cannot be regarded as a petroleum resource, as it purportedly is “created” through hydraulic fracturing, rather than occurring naturally.²⁸ This view is misguided. Shale gas is a petroleum resource in the narrow sense: a gas that occurs in natural conditions.²⁹ It is not created by hydraulic fracturing. It therefore still qualifies as petroleum for purposes of the MPRD Act. However, it requires unconventional means of production, which are not fully subsumed by the South African legislative framework (yet). At present, regulations governing the hydrofracturing process are debated by the responsible parliamentary committee in the South African legislature.

Petroleum is found in the sedimentary rock in the uppermost crust of the earth.³⁰ Sedimentary rock is composed of ancient sediments such as sand, shells and mud and is the source and reservoir rock for petroleum.³¹ Reservoir rock is a term used to describe sedimentary rock with billions of pores (a permeable rock)³² where petroleum

²⁷ Whether the regulatory frameworks in South Africa and Namibia include manufactured and unconventional hydrocarbons, is an issue explored briefly in Chapter Five below.

²⁸ Bekker F *Review of the Draft EMP in Support of an Application for Gas Exploration in the Western Karoo (Central Precinct) by Shell Exploration Company* (2011) Report Prepared in Response to the Publication for Public Comment of Shell's EMP, Stilbaai Clean Stream Environmental Services at 37.

²⁹ See a full discussion in Chapter Five.

³⁰ Lowe (note 21) at 2; Hyne (note 24) at xxxiii.

³¹ Lowe (note 21) at 2; Hyne (note 24) at xxxiii–xxxiv.

³² Lowe (note 21) at 2; Hyne (note 24) at xxxiv. See also Jones (note 25) at 157.

eventually accumulates.³³ Petroleum is fugacious and flows (“migrates”) through the sedimentary rock along the path of least resistance, which is the reservoir rock layer.³⁴ For a reservoir rock to be a good source for petroleum, it must be porous and permeable.³⁵ High porosity means that the amount of pore space is relatively large, which means that the rock contains a relatively large area where petroleum may accumulate.³⁶ The permeability of a rock on the other hand is its characteristic to allow petroleum to float upwards through the original sea water in the pores, which is heavier than the petroleum, to collect at a trap and eventually to float towards a borehole.³⁷ This movement of the petroleum through the reservoir rock and up the rock angle towards the surface is called migration.³⁸ Figure 5 below illustrates a typical conventional petroleum trap.

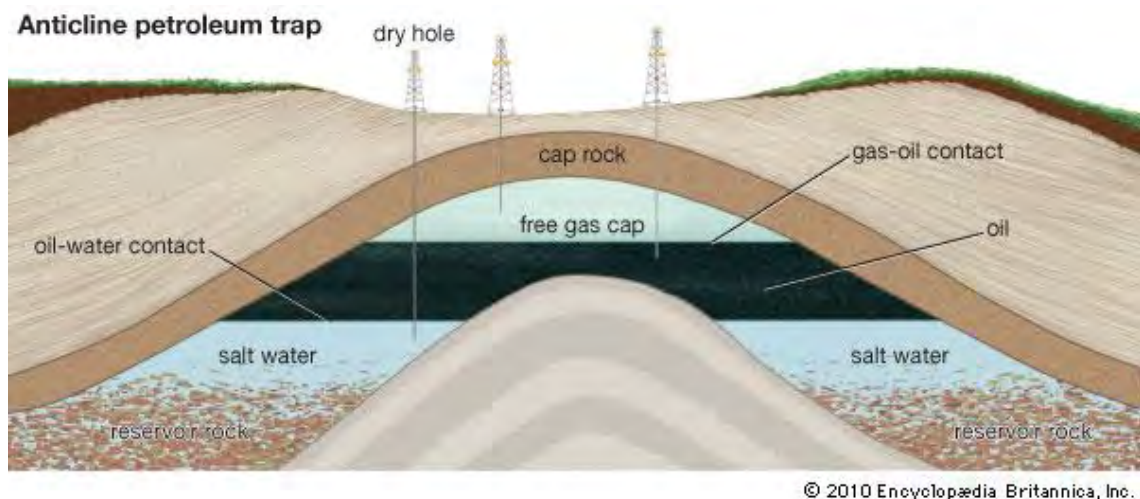


Figure 5: Anticline Petroleum Trap³⁹

If no measure is in place to stop the migration of petroleum, the petroleum will eventually seep onto the surface and escape, where it either evaporates or accumulates

³³ Smith E "World Energy Resources" in *Materials on International Petroleum Transactions* 2 ed (2000) Denver Rocky Mountain Mineral Law Foundation at 8.

³⁴ Hyne (note 24) at xxxv.

³⁵ Lowe (note 21) at 2. See also Hyne (note 24) at 519 and Downey (note 2) at 94.

³⁶ Lowe (note 21) at 2.

³⁷ Lowe (note 21) at 2.

³⁸ Hyne (note 24) at xxxv; Jahn F, Cook M and Graham M *Hydrocarbon Exploration and Production* 2 ed (2008) Amsterdam Elsevier BV at 19.

³⁹ Encyclopedia Britannica "Petroleum Trap" available at <http://www.britannica.com/EBchecked/media/165264/Natural-gas-trapped-by-an-impermeable-caprock-in-an-underground> [accessed 02.02.2014].

as tar sands or asphalt lakes.⁴⁰ However, over millions of years sedimentary rocks folded and faulted and formed traps, which contain salt water.⁴¹ A trap is an elevated area on the petroleum reservoir rock⁴² (such as a dome or reef) that is covered by caprock, a form of impermeable rock such as shale or salt.⁴³ As petroleum moves along the reservoir rock up the angle of the rock towards the surface, it may encounter a trap and accumulate in the trap.⁴⁴ These traps are called anomalies and are limited in size and may occur at depths of between several hundred feet to a few thousand feet.⁴⁵ As the petroleum migrates into the trap, the fluids and gas are separated according to their density, with the gas on top forming the free gas cap, the oil in the middle forming the oil reservoir and the salt water on the bottom.⁴⁶ This is illustrated in Figure 3 above.

Petroleum exploration activities, discussed below, are aimed at locating these traps. Once a trap has been located, it is tested and, if it is believed that commercial quantities of petroleum exist, production operations commence; subject, of course, to compliance with the relevant legal rules.

The need for a clear description of the meaning of “natural occurrence” as a definitional requirement is illustrated by the South African case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others*.⁴⁷ One of the issues that the High Court had to consider was whether diamonds in tailing dumps created before commencement of

⁴⁰ Taverne (note 25) at 1; Jahn, Cook and Graham (note 38) at 23.

⁴¹ Hyne (note 24) at xxxv; Lowe (note 21) at 2.

⁴² These traps are classified as either structural traps or stratigraphic traps. Structural traps are anticlinal traps, fault traps or salt dome (also salt-related) traps resulting from the deformation (folding and faulting) in the structure of the subsurface, which results in petroleum migrating to a certain point where it cannot go any further (the petroleum trap). Stratigraphic traps (such as carbonate reef traps and “updip pinchouts” of sandstone) accrue oil as a result of variations of the rock character, rather than faulting or folding of the subsurface. Apart from these so-called “primary stratigraphic traps”, angular unconformities (secondary stratigraphic traps) and may form giant petroleum traps. Further information is available in Hyne (note 24) at 168, 181; Smith (note 33) at 10 – 13; Allaby (note 24) at 556. Crain ER “Structural Traps” available at <http://www.spec2000.net/20-struct4.htm> [accessed 02.02.2014]. See also Oil on My Shoes “Oil and Gas Traps” available at <http://www.geomore.com/oil-and-gas-traps/> [accessed 02.02.2014]; The Paleontological Research Institute “Structural Traps” available at <http://www.priweb.org/ed/pgws/systems/traps/structural/structural.html> [accessed 02.02.2014] at 11.

⁴³ Hyne (note 24) at xxxvi and 540. See also Lowe J *Oil and Gas Law in a Nutshell* 5 ed (2009) St Paul West Publishing Co at 3 and Downey (note 2) at 95.

⁴⁴ Hyne (note 24) at xxxv and 540.

⁴⁵ Lowe (note 21) at 2.

⁴⁶ Hyne (note 24) at xxxv–xxxvi.

⁴⁷ *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* [unreported judgment of the Orange Free State Provincial Division, delivered on 13 December 2007, Case No 3215/06].

the MPRD Act were minerals for purposes of the MPRD Act. The respondents' contention was that the diamonds were still within the kimberlite found on the tailing dumps and therefore still occurred naturally and vested under the custodianship of the state.⁴⁸ The applicants contended, however, that the ore containing the diamonds were severed from the land and a new thing (movable *res*) was created.⁴⁹ Ownership of the ore, according to the applicants, passed when the ore was severed from the land.⁵⁰ The court examined the definition of minerals in the Mineral and Petroleum Resources Development Act 28 of 2002 and the nature and regulation of tailings⁵¹ and concluded that the diamonds, even though they are still in the kimberlite ore, no longer occurs naturally. Furthermore, the Court held that these tailing dumps were also not residue stockpiles, as they were produced before commencement of the Act.⁵² As a result of the artificial nature of tailings, and given that the tailings were produced before commencement of the MPRD Act, they could not be considered to be "minerals" for purposes of the MPRD Act. Accordingly, the court found, this Act did not apply to diamonds in tailing dumps.⁵³ A legislative amendment was needed to correct the situation. The Mineral and Petroleum Resources Amendment Bill of 2012 substituted the definition of "residue stockpiles" by including in this definition historic mines and dumps created before the commencement of the MPRD Act.⁵⁴ "Mining area" was amended to include residue deposits and residue stockpiles⁵⁵ and "mining operations" was amended to include operations on residue stockpiles.⁵⁶ The intention of these amendments was to include minerals occurring in tailing dumps produced before the enactment of the MPRD Act under the definition of minerals.⁵⁷

Petroleum resources are different from minerals such as diamonds. They present in either fluid or gaseous form and exist in large quantities. Despite these differences, a similar argument could be constructed in the context of petroleum as well, by a party

⁴⁸ *De Beers / Ataquia Mining* (note 47) at [52].

⁴⁹ *De Beers / Ataquia Mining* (note 47) at [53].

⁵⁰ *De Beers / Ataquia Mining* (note 47) at [53].

⁵¹ *De Beers / Ataquia Mining* (note 47) at [54] to [66].

⁵² *De Beers / Ataquia Mining* (note 47) at [68].

⁵³ *De Beers / Ataquia Mining* (note 47) at [68].

⁵⁴ Section 1(q) of the Mineral and Petroleum Resources Amendment Bill of 2012.

⁵⁵ Section 1(l) of the Mineral and Petroleum Resources Amendment Bill of 2012.

⁵⁶ Section 1(m) of the Mineral and Petroleum Resources Amendment Bill of 2012.

⁵⁷ Badenhorst and Mostert (note 3) at 13-14.

wishing to exclude certain types of resources from the purview of regulatory legislation. The argument could be that where the petroleum resources was subject to human interference, it may no longer fall under the definition of petroleum, as it no longer occurs naturally.

The *De Beers*-case illustrates that a proper understanding of the natural occurrence of minerals (and petroleum for that matter) is necessary to determine the applicability of legislation governing these resources. A knowledge of the technical aspects of petroleum and petroleum occurrence will assist in interpreting and applying the relevant legislation.

4. The Petroleum Exploitation Process

The petroleum exploitation process comprises exploration activities, drilling and testing of wells and production. It is followed by decommissioning. This section provides a brief overview, which will assist understanding of the type of activities for which legal regulation is needed. One may ask, for instance, what kind of licence is to be granted where a company wishes to employ hydraulic fracturing techniques during its operations.⁵⁸ Closer scrutiny will reveal that it is rather difficult to bring such activity within the purview of a production licence, as the exploitation occurs already if exploration is successful.⁵⁹

4.1 Petroleum Exploration and Drilling

In the early days of petroleum exploitation, drillers did not have the knowledge of subsurface petroleum deposits or the methods of exploration that exist today.⁶⁰ However, as a result of leaky traps that caused petroleum to seep onto the surface of the

⁵⁸ Early in 2011, Royal Dutch Shell applied for exploration rights in the Karoo to explore for shale gas. The application by Shell elicited controversy, especially with regard to the possible use of hydraulic fracturing and the impact thereof on the environment and on water resources. See for example Cropley E “Karoo Fracking: Water, Wealth and White” 28 October 2013 *Mail and Guardian* available at <http://mg.co.za/article/2013-10-28-karoo-fracking-water-wealth-and-whites> [accessed 02.02.2014]; Prinsloo L “Fracking in the Karoo Takes a Big Step Forward” 20 October 2013 *Business Day Live* available at <http://www.bdlive.co.za/business/2013/10/20/fracking-in-the-karoo-takes-a-big-step-forward> [accessed 02.02.2014]; SAPA “Shell Karoo Fracking: An Eco Example” 19 July 2011 *News24* available at <http://www.news24.com/SciTech/News/Shell-Karoo-fracking-an-eco-example-20110719> [accessed 02.02.2014].

⁵⁹ See Chapter Six below.

⁶⁰ Hyne (note 24) at xxxvi.

land, they had some success in locating and drilling anomalies.⁶¹ Now, in the exploration phase, the holder of a right to explore for petroleum may attempt to locate anomalies by geological, geochemical or geophysical methods.

Geological exploration include mapping,⁶² geological surveys⁶³ and remote imaging methods.⁶⁴ Geochemical exploration techniques involve taking water and soil samples from an exploration area and analysing them in laboratories,⁶⁵ to test an existing exploration area. These methods are premised thereon that hydrocarbons migrate upwards from subsurface petroleum deposits to the earth's surface.⁶⁶ Geophysical methods of exploration respond to variations in the physical properties of the earth's subsurface⁶⁷ and involve gravity exploration,⁶⁸ magnetic exploration⁶⁹ and seismic studies.⁷⁰

⁶¹ Hyne (note 24) at xxxvi; Horvitz L "Geochemical Exploration for Petroleum" 1985 (229) *Science* 821 at 821.

⁶² Mapping involves geologists recording on maps how sedimentary rock layers crop out on the surface of the ground, projecting these outcrops into the subsurface and attempting to locate the traps. Hyne (note 24) at xxxvi.

⁶³ Geological surveying entails that geologists collecting and analysing samples of rock to find areas where there might be sedimentary rocks. This method, however, is no longer in regular use, as most petroleum fields that can be found by picking up and testing rocks have been located. Most countries also have a Geological Survey that publishes reports and maps detailing the petroleum geology of the area. Geologists use mainly two types of maps, namely topographic maps, which show the elevations of the earth's surface, and geological maps, which show where each rock layer crops out at the earth's surface. Geologists may also use subsurface mapping, the three most important types of which are structural, isopach and percentage maps. These three kinds of maps use contours to depict the subsurface rock. Structural maps show the elevation of the top of a subsurface sedimentary rock layer, isopach maps show the thickness of a subsurface sedimentary rock layer and percentage maps plot the percentage of a specific rock type. Hyne (note 24) at 121–128, 206. Downey (note 2) at 98–99.

⁶⁴ Remote imaging analysis involves the analysis of images taken from aircrafts and satellites, such as those taken by the six United States *Landsat* satellites, the French *SPOT* satellites or the Canadian *RADARSAT* satellite. The advent of airplanes and aerial photography has made surface mapping more efficient. What explorers are looking for in the images are signs of traps. Hyne (note 24) at 199–120; Downey (note 2) at 98–99.

⁶⁵ Hyne (note 24) at 206.

⁶⁶ One method of geochemical exploration involves drilling shallow holes (between one and two metres), sealing the hole and then after one or two days taking samples of the soil air accumulated in the holes and testing the air. Soil air from a hole over a gas field will have higher concentrations of methane than soil air from holes beyond the border of the gas field. A second method, and one that can be conducted over all areas (including offshore areas), involves analysis of soil rather than soil air. Horvitz (note 61) at 821.

⁶⁷ Jahn, Cook and Graham (note 38) at 25.

⁶⁸ Gravimetric surveys, or gravity exploration techniques, test for minute variations in the earth's gravitational field, which is caused by changes in density of subsurface rock. This may indicate the type of rock and any fluids underneath the surface. Downey (note 2) at 99; Hyne (note 24) at 209–210; Jahn, Cook and Graham (note 38) at 26.

Drilling operations for purposes of testing in Namibia and South Africa fall under the definition of exploration operations.⁷¹ Drilling and testing of wells therefore fall under the exploration right or licence issued in South Africa and Namibia respectively.

The only way to test an anomaly is to drill a well, either with a rotary rig or a cable-tool rig.⁷² An exploratory (“wildcat”) well may be drilled to test a trap that has never produced; to test a reservoir in a known field that has never produced; or to extend the known limits of a producing reservoir.⁷³

Once a discovery is made, wells must be drilled to ascertain the size of the field.⁷⁴ These wells are important to establish whether the discovery straddles national boundaries or the boundaries of the area over which a right to petroleum has been granted.⁷⁵ It is also important to decide whether it will be feasible to proceed with production.⁷⁶ Appraisal (or definition) wells and delineation wells are drilled around a producing well to determine the size of the well,⁷⁷ while step-out wells are drilled outside the proven limits of a petroleum field to determine whether production can be expanded beyond a producing area.⁷⁸

Developmental wells drilled in the known extent of the petroleum field are used to begin production after a reservoir has been discovered and defined.⁷⁹ Infill wells may

⁶⁹ Magnetic field surveys look at variations in the earth’s magnetic field caused by variations in the magnetic properties of rocks. Magnetic rock, such as igneous and metamorphic rock, does not contain petroleum. Most petroleum can be found in non-magnetic rock. Therefore, magnetic exploration is used to explore for petroleum by determining whether rock is magnetic, in which case it will not contain petroleum. Jahn, Cook and Graham (note 38) at 26; Downey (note 2) at 99; Hyne (note 24) at 210–211.

⁷⁰ Seismic testing involves creating sound waves and bouncing them against subsurface material. The time it takes for the sounds to be picked up again is then measured. This creates an image of the shape of the subsurface sedimentary rock and locates petroleum anomalies. The greatest advancements in exploration in the last number of decades have been in respect of new seismic acquisition techniques and computer processing of digital seismic data. Downey (note 2) at 99; Hyne (note 24) at 213; Jahn, Cook and Graham (note 38) at 27.

⁷¹ Section 1 of the MPRD Act, *sv* “exploration operation” and section 1 of the Petroleum (Exploration and Production) Act 2 of 1991, *sv* “exploration operations”.

⁷² Lowe (note 21) at 3.

⁷³ Hyne (note 24) at 241; Downey (note 2) at 101. Where a wildcat well is drilled at least 3 km away from any known production, it is called a rank wildcat well.

⁷⁴ Hyne (note 24) at 241; Downey (note 2) at 101.

⁷⁵ See for example Hyne (note 24) at 241

⁷⁶ Hyne (note 24) at 241

⁷⁷ Downey (note 2) at 101; Hyne (note 24) at 241.

⁷⁸ Downey (note 2) at 101; Hyne (note 24) at 241.

⁷⁹ Hyne (note 24) at 241; Downey (note 2) at 101.

then be drilled between producing wells in an established petroleum field to increase the production rate.⁸⁰

A well must be properly tested to ascertain whether it will produce enough petroleum to make completion of the well worthwhile.⁸¹ After drilling and testing of a well, two options are available: if it is not feasible to continue, the well is plugged and abandoned as a dry hole or, if it is feasible to continue, the well is completed.⁸²

4.2 Petroleum Production

Petroleum production is a capital-intensive exercise. A petroleum company will only continue to the production phase if it is certain that production of petroleum from the located reservoir will be commercially viable. Petroleum located in traps are produced using conventional production methods, or drilling. Petroleum located in unconventional sources, such as shale rock, may be produced using unconventional methods, such as hydraulic fracturing.

4.3.1 Conventional Production

If a petroleum company decides to continue with production, the well must be cased.⁸³ This entails inserting a steel pipe, called a casing string and smaller in diameter than the well hole, into the well and pouring cement into the well hole outside the casing string. This process is referred to as casing or setting pipe.⁸⁴ Casing ensures that the well is stabilised and that the sides do not cave in. It also ensures that surrounding fresh water resources are not contaminated and that the production itself is not diluted.⁸⁵

A perforating gun containing explosives is then lowered into the well and detonated to perforate the casing, cement and reservoir rock. The perforation allows the petroleum in the reservoir rock to drain into the well. Another pipe called tubing, smaller in diameter than the casing, is then inserted into the well. If the permeability of the reservoir rock does not allow the petroleum to flow into the well, the well must be stimulated either by

⁸⁰ Hyne (note 24) at 241.

⁸¹ Hyne (note 24) at 297.

⁸² Hyne (note 24) at 333.

⁸³ Lowe (note 21) at 5.

⁸⁴ Lowe (note 21) at 5–6; Hyne (note 24) at 333.

⁸⁵ Hyne (note 24) at 333.

hydraulic fracturing or by injecting acid to dissolve away some of the rock. If the natural pressure in the rock is high, the petroleum will be forced to the surface of the well through the tubing. If the pressure is low, pumping equipment is installed to pump out the petroleum to the surface.⁸⁶

At the top of the well on the surface is a large permanent structure called the wellhead. The wellhead consists of the casing head and the tubing head.⁸⁷ Crude oil, natural gas and salt water are often produced simultaneously.⁸⁸ As a result, once the produced fluids exit the surface at the wellhead, they must flow through a separator which removes the natural gas. After this, the fluid flows through a heater-treater to separate the oil from the water. The gas is put in a pipeline and the oil is stored, piped or trucked to the refinery.⁸⁹

The above described a typical, vertical well drilling. Another method of drilling is horizontal drilling,⁹⁰ where a well is drilled vertically and, at a certain depth, the drill is turned and drilling continues horizontally through the reservoir.⁹¹ The primary reason for using this method is that the wellbore is exposed to a far greater surface area than with a traditional wellbore.⁹²

4.3.2 Unconventional Production

Another method of extraction that is becoming increasingly popular,⁹³ and one that is causing great controversy, is hydraulic fracturing or “hydrofracturing”,⁹⁴ a

⁸⁶ Lowe (note 21) at 6; Hyne (note 24) at 345.

⁸⁷ Hyne (note 24) at 347.

⁸⁸ Lowe (note 21) at 6.

⁸⁹ Lowe (note 21) at 6.

⁹⁰ Deutch J "The Good News about Gas: The Natural Gas Revolution and its Consequences" 2011 (90) *Foreign Affairs* 82 at 84.

⁹¹ See US Energy Information Administration “What is Shale Gas and Why is it Important?” available at <http://geology.com/energy/shale-gas/> [accessed 02.02.2014].

⁹² Stemplewicz A "The Known 'Unknowns' of Hydraulic Fracturing: A Case for a Traditional Subsurface Trespass Regime in Pennsylvania" 2011 (13) *Duquesne Business Law Journal* 219 at 223.

⁹³ First used in 1948 / 1949 in the United States and replaced the process of explosive fracturing. *Coastal Oil and Gas Corpo v Garza Energy Trust* Case No. 05-0466 of the Supreme Court of Texas (argued 28.09.2006) at 5; Hyne (note 24) at 423.

⁹⁴ Wiseman H "Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation" 2009-2010 (20) *Fordham Environmental Law Review* 115 at 115; Hyne (note 24) at 42; Allaby (note 24) at 284.

technological advancement in the economic recovery of shale gas.⁹⁵ Hydraulic fracturing is employed to produce natural oil and natural gas from “tight” (i.e. relatively impermeable) formations with low porosity.⁹⁶ A more porous and permeable formation will allow more natural gas to be exposed to the wellbore.⁹⁷ Hydraulic fracturing has made horizontal drilling a far more cost-effective option.⁹⁸ It is a method of well or formation stimulation that involves liquid (“frack fluid”) being pumped down a well under high pressure to fracture the reservoir rock or to expand existing fractures and to force out oil or natural gas.⁹⁹ The pressure from the liquid creates cracks in the rock formation and these cracks spread along the natural fault lines of the reservoir rock in opposite directions from the well.¹⁰⁰

Fracking occurs in three stages. First, a pad of fracking fluid is injected into the well to initiate fracturing. Then, a slurry of fracking fluid mixed with proppants (small spheres like sand, ceramics or aluminium oxide pellets) are pumped down.¹⁰¹ The proppants lodge in the fractures to keep them open once the pumping of the fracking fluid is stopped. Once fractures have formed, more fluids are pumped down the wellbore to continue the development of the fractures and to carry the proppant further into the formation.¹⁰² The well is then back-flushed to remove the fracking fluid, leaving the cracks open for gas or oil to flow to the wellbore.¹⁰³ The ultimate goal is, through fractures, to connect the wellbore to the area in the shale in which production has been stimulated, allowing the gas to flow into the well.¹⁰⁴

Hydraulic fracturing allows petroleum to escape (or be produced) from tight or unconventional formations in order for it to be produced commercially. The moment petroleum is produced, exploration methods are substituted by productions methods. In

⁹⁵ Ground Water Protection Council and ALL Consulting *Modern Shale Gas Development in the United States: A Primer* (2009) Washington DC Office of Fossil Energy, US Department of Energy at 56, available at http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf [accessed 08.06.2011].

⁹⁶ *Coastal Oil and Gas* (note 130) at 4; Downey (note 2) at 178.

⁹⁷ Stemplewicz (note 92) at 224.

⁹⁸ Stemplewicz (note 92) at 224.

⁹⁹ Hyne (note 24) at 489; Wiseman (note 94) at 115 and 118; Ground Water Protection Council and ALL Consulting (note 95).

¹⁰⁰ *Coastal Oil and Gas* (note 130) at 5.

¹⁰¹ Hyne (note 24) at 424; Allaby (note 24) at 284.

¹⁰² Ground Water Protection Council and ALL Consulting (note 95).

¹⁰³ Hyne (note 24) at 424; *Coastal Oil and Gas* (note 130) at 5.

¹⁰⁴ Wiseman (note 94) at 118.

Namibia and South Africa, different authorisations are granted in respect of exploration and production operations. It is therefore important to identify the moment when exploration operations become production operations in order to know whether the company holds the correct authorisation.

4.3.3 Well Stimulation

A producing well may continue to produce petroleum for many years until the natural or primary pressure in the well becomes so low that petroleum no longer flows into the well.¹⁰⁵ Secondary and tertiary recovery methods are then available. A producer then has to decide whether to stimulate the well by hydraulic fracturing or by injecting acid to dissolve away some of the rock.¹⁰⁶ Other recovery methods include injecting natural gas above natural oil to force it down or to pump water below the natural oil to force it upwards.¹⁰⁷ Water flooding is the most commonly used secondary production method.¹⁰⁸ Oil in the rock can also be heated by fire flooding, which then lowers the viscosity of the petroleum and increases the pressure in the reservoir.¹⁰⁹ Another alternative is to use complex chemical techniques to stimulate further recovery.¹¹⁰ Neither the Namibian nor the South African legislation requires additional authorisation for well stimulation – this falls under production activities covered by the production right or licence.¹¹¹

4.4 Decommissioning

Although decommissioning signifies the end of the exploitation process, its importance should not be overlooked. When all production operations have ceased, the disused petroleum structures are decommissioned. This poses many legal, regulatory and technical challenges for international law, states and the petroleum industry.¹¹²

¹⁰⁵ Lowe (note 21) at 7; Downey (note 2) at 134.

¹⁰⁶ Lowe (note 21) at 7; Downey (note 2) at 139 – 140.

¹⁰⁷ Allaby (note 24) at 512; Downey (note 2) at 137 – 139.

¹⁰⁸ Downey (note 2) at 137.

¹⁰⁹ Lowe (note 21) at 7.

¹¹⁰ Lowe (note 21) at 7.

¹¹¹ Production activities are discussed in more detail in Chapter Five below.

¹¹² Altit F and Igiehon M "Decommissioning of Upstream Oil and Gas Facilities" in Picton-Turbervill G (ed) *Oil and Gas: A Practical Handbook* (2009) London, Globe Business Publishing Ltd at 257.

Decommissioning “describes the set of activities to be undertaken to manage and dispose of installations and platforms and eliminate environmental footprint once a production field is nearing, or reaches, the end of its economic life.”¹¹³ Other terms that may refer to decommissioning include abandonment, removal and disposal.¹¹⁴ Decommissioning activities form part of the right awarded to produce petroleum.¹¹⁵ However, many jurisdictions (such as South Africa and Namibia) impose additional obligations on holders in respect of decommissioning.¹¹⁶ Decommissioning may take many forms, depending on the type of facilities and the location.¹¹⁷ The basic aim of decommissioning is to render all wells safe and to remove most (or where possible all) signs of production on the surface or seabed.¹¹⁸

There is very little practical experience with this phase of petroleum exploitation in Namibia and South Africa because of the relative young nature of this industry.¹¹⁹ Decommissioning raises various issues relating to the environment, technology, sustainable development, preparation work, costs and allocation of liability.¹²⁰ Moreover, the area of law relating to decommissioning is still evolving.¹²¹ Decommissioning received attention in 1995 when Shell planned on dumping Brent Spar (an oil storage and tanker loading buoy operated by Shell) in deep Atlantic waters, a decision that was met with fierce opposition and later reversed.¹²² Concomitant with the controversy relating to Brent Spar, many North Sea petroleum developments are reaching the decommissioning phase in their lifecycle.¹²³ This is causing the spotlight to be cast on decommissioning.

¹¹³ Altit and Igiehon (note 112) at 257.

¹¹⁴ Altit and Igiehon (note 112) at 258; Paterson J "Decommissioning of Offshore Oil and Gas Installations" in Gordon G, Paterson J and Üşenmez E (eds) *Oil and Gas Law - Current Practice and Emerging Trends* 2 ed (2011) Dundee Dundee University Press at 285.

¹¹⁵ Altit and Igiehon (note 112) at 258.

¹¹⁶ See Chapter Six below at par 2.4.3.

¹¹⁷ Jahn, Cook and Graham (note 38) at 419.

¹¹⁸ Jahn, Cook and Graham (note 38) at 422.

¹¹⁹ See further Chapter Six below.

¹²⁰ Altit and Igiehon (note 112) at 258; Paterson (note 114) at 285; Hammerson M *Upstream Oil and Gas* (2011) London Globe Law and Business at 437.

¹²¹ Altit and Igiehon (note 112) at 268.

¹²² Hammerson (note 120) at 437.

¹²³ Hammerson (note 120) at 437.

5. Concluding Remarks

This thesis only focuses on the upstream petroleum industry, and as such concentrates on issues relating to petroleum occurrence, exploration and production. Because the South African and Namibian legislatures employ technical terms without properly defining them, it is necessary to have a basic overview of the technical aspects of petroleum and petroleum exploitation. In this chapter, the detail necessary to amplify the legislative frameworks of South Africa and Namibia was reviewed. From the few South African examples mentioned, it is clear that a broader understanding of the petroleum industry is required when working with the legislative framework. The same may apply to Namibia as well. The legislature may, in the light of the rise of unconventional production methods and the exploitation of unconventional resources, consider amending the legislation to provide for this. References throughout this thesis will be made back to this chapter where a technical discussion beyond the legislative framework is necessary.

Chapter Three:

GENERAL RULES GOVERNING OWNERSHIP OF, CONTROL OVER AND ACCESS TO PETROLEUM RESOURCES

1. Introduction

The regulation of natural resources raises contentious questions on a national and international level.¹ Questions raised include who may own these resources, in whose interest must these resources be exploited and whether limitations should be placed on the use of natural resources for the sake of other social values.² Crucial to answering these questions is an understanding of the role that state sovereignty over natural resources play. The legal position in respect of the regulation of resources also differs in jurisdictions where the ownership of the resources under the surface of the land differ from the landownership, as opposed to jurisdictions where the landowner is considered the owner of everything below the surface of the land.³ These questions and issues must be addressed by the regulatory framework that a state adopts in respect of natural resources, which reflects the juncture where international law, national law and property law (especially ownership) intercept.⁴

To discuss the ownership and control of petroleum, it is necessary first to look at the international framework within which petroleum ownership and regulation operates. This big-picture view allows for better scrutiny of the inner workings of different jurisdictions' regulatory frameworks in a comparative setting. The different models of ownership in respect of petroleum resources, and the basic rules applicable, are discussed. This is then followed by a generalised discussion of how access to petroleum resources is granted. This discussion will lay the foundation for the

¹ Barnes R *Property Rights and Natural Resources* (2009) Portland Hart Publishing at 10.

² Barnes (note 1) at 10.

³ See for example Daintith T *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (2010) Washington DC RFF Press at 7.

⁴ See for example Barnes (note 1) at 10 – 11.

discussion of ownership of, control over and access to petroleum resources in South Africa and Namibia, to follow in Chapter Four and Chapter Five.

2. Principle of Permanent Sovereignty over Natural Resources

Almost all natural resource regimes are based on the jurisprudential theory of state sovereignty.⁵ Sovereignty signifies independence insofar as it relates to the relationship between states: “[i]ndependence in regard to a portion of the globe is a right to exercise therein, to the exclusion of any other state, the function of the state”.⁶ Sovereignty in international law is normally employed to express the external rather than internal character of a state as regards its ability or capacity to govern itself independently of other states.⁷ A state’s claim to sovereignty extends over its land, territorial waters, exclusive economic zone and continental shelf.⁸ Sovereignty is primarily concerned with the legal relationships between states. This includes maintenance of and control over the natural resources of a particular state.⁹ In the light of the principle of sovereignty, natural resources have traditionally been treated according to the rule that, once natural resources fell within the exclusive sovereignty of a state, these resources were subject to a few limitations.¹⁰ After World War II, this traditional rule became embodied in the principle of permanent sovereignty over natural resources.¹¹

The principle of permanent sovereignty over natural resources has evolved into an accepted principle of international law,¹² despite contestations about its content and

⁵ Smith E “World Energy Resources” in *Materials on International Petroleum Transactions* 2ed (2000) Denver Rocky Mountain Mineral Law Foundation 28.

⁶ *Island of Palmas Case* 2 RIAA 829 (1928) at 838.

⁷ Baker S “*Halleck’s International Law* 3ed (1893) London Kegal Paul, Trench, Trübner, & Co. Ltd at 66.

⁸ See for example Hammerson M *Upstream Oil and Gas* (2011) London Globe Law and Business at 36.

⁹ Barnes (note 1) at 11.

¹⁰ Barnes (note 1) 221.

¹¹ Barnes (note 1) 221.

¹² Duruigbo E “Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law” 2006 *George Washington International Law Review* 33 at 39-40; Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* 1 ed (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at MPRDA-108 and the authorities cited there; Elian G *The Principle of*

purpose. It was regarded as a consequence of the legal and political call for self-determination and decolonization.¹³ This principle is the basis of ownership of states over the natural resources within their boundaries¹⁴ and enables a state to exercise control over the natural resources within its boundaries. Its purpose is also to encourage international cooperation in the economic development of developing countries.¹⁵

The principle of permanent sovereignty was formally endorsed in a 1952 Resolution of the United Nations entitled *Right to Exploit Freely Natural Wealth and Resources*,¹⁶ but the “most significant expression”¹⁷ thereof is embodied in the 1962 Resolution entitled *Permanent Sovereignty over Natural Resources*.¹⁸ The latter states that the right of peoples and nations to permanent sovereignty over the natural wealth and natural resources must be exercised in the interest of their national development, as well as in the interest of the people of the state.¹⁹ This is of particular importance for this thesis, as the 1962 Resolution recognises that natural resources, although resorting under the sovereignty of the state, must be exploited in the interest of its people whom it represents.

Under the 1962 Resolution, nationalisation and expropriation of these resources is possible, but must be based on grounds or reasons of public utility, security or the national interest.²⁰ These grounds or reasons are recognised as overriding purely individual or private interests.²¹ Appropriate compensation must be paid.²²

Sovereignty over Natural Resources (1979) Alphen aan den Rijn MD Sijthoff & Noordhoff at 15.

¹³ Dale et al (note 12) at MPRDA-110.

¹⁴ Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.35.

¹⁵ Alramahi (note 14) at §1.41.

¹⁶ United Nations General Assembly Resolution 626 (VII) *Right to Exploit Freely Natural Wealth and Resources*, 21 December 1952. See also Duruigbo at 38.

¹⁷ Duruigbo (note 12) at 38.

¹⁸ United Nations General Assembly Resolution 1803 (XVII) *Permanent Sovereignty over Natural Resources*, 14 December 1962.

¹⁹ Clause 1 of the GA Resolution 1803.

²⁰ Clause 4 of the GA Resolution 1803.

²¹ Clause 4 of the GA Resolution 1803.

²² Clause 4 of the GA Resolution 1803.

Initially the principle of state sovereignty of natural resources was understood as element of self-determination to protect developing states against exploitation by other developed states. This was supposed to introduce a new international economic order,²³ an idea which was politically *en vogue*, but turned out to be unattainable in practice. The 1962 Resolution signified a shift in emphasis: developing countries needed and sought an international economic order in terms whereof the international community evolved “towards at least a semblance of international economic parity and equity”.²⁴

The new, post-1962 vision of the principle of permanent sovereignty over natural resources insisted on absolute economic sovereignty rather than economic co-operation in view of foreign investment.²⁵ This came at the behest of developing states who held the view that developed states maintained their economic advantage despite processes of decolonisation (economic or political).²⁶ Developing countries wanted, amongst others, more control over activities of foreign corporations within their borders, and better terms of trade.²⁷ From their vantage point, a new international economic order should reflect a change in the balance of world economic forces by promoting the rights of developing countries and emphasising the corresponding obligations on the part of developed countries.²⁸

The 1962 Resolution was reaffirmed in a number of other resolutions,²⁹ but in 1973 a resolution was passed dealing with permanent sovereignty over natural resources which

²³ Dale et al (note 12) at MPRDA-110. The developing countries were successful in having three resolutions adopted establishing a new international economic order, namely General Assembly Resolution 3201 (S-VI) *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, General Assembly Resolution 3202 (S-VI) *Programme of Action on the Establishment of a New International Order*, 1 May 1974 and General Assembly Resolution 3281 (XXIX) *Charter of Economic Rights and Duties of States*, 12 December 1974. See also Gordon R “The Dawn of a New, New International Economic Order” (2009) *Law and Contemporary Problems* 131 at 131.

²⁴ Gordon (note 23) 142.

²⁵ Dale et al (note 12) at MPRDA-110.

²⁶ Dale et al (note 12) at MPRDA-111.

²⁷ Gordon (note 23) at 143.

²⁸ Dale et al (note 12) at MPRDA-111; Gordon (note 23) at 144.

²⁹ See General Assembly Resolution 2158 (XXI) *Permanent Sovereignty over Natural Resources*, 29 November 1966, General Assembly Resolution 2386 (XXIII) *Permanent Sovereignty over Natural Resources*, 19 December 1968 and General Assembly Resolution 2692 (XXV) *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development*, 11 December 1970.

omitted all references to international law with regard to the measure of compensation payable on nationalisation of resources.³⁰ This set the stage for dissent and confrontation,³¹ which eventually resulted in the adoption of the *Charter of Economic Rights and Duties of States*,³² which reaffirmed states' permanent sovereignty over natural resources within their boundaries and provided states with more control over their own economic fate.³³ This Charter envisions all states to have full permanent sovereignty over their wealth, natural resources and economic activities, which includes possession, use and disposal, and to exercise this ability freely.³⁴ The Charter retained the general principles of permanent sovereignty over natural resources embodied in the 1962 Resolution, but also contained various critical differences.³⁵ For example, it also omits all references to international law and favours domestic law, which means that compensation for nationalisation is to be determined by municipal laws and not international law. This may be to the detriment of foreign investors; and eventually also to the countries who subscribe to this view, as investors are bound to prefer investment into countries who allow the principles of international law to apply.³⁶

The Charter had the effect that the consensus underlying the 1962 Resolution was destroyed.³⁷ The developed countries rejected the idea that there was any responsibility on them to ensure even an impression of equality between developed and developing countries.³⁸ The Charter was seen as radical, perhaps even socialist. The disagreement between developing and developed countries over the Charter prevented it from even attaining the status of "soft law".³⁹ The Charter and the accompanying resolutions establishing a new international economic order appeared to undermine the implied assumption that the economic sphere is market-driven and self-regulating and that it

³⁰ General Assembly Resolution 3171 (XXVIII) *Permanent Sovereignty over Natural Resources*, 17 December 1973.

³¹ Dale et al (note 12) at MPRDA-111.

³² United Nations General Assembly Resolution 3281 (XXIX) *Charter of Economic Rights and Duties of States*, 12 December 1974.

³³ Gordon (note 23) at 132.

³⁴ Clause 2 of the GA Resolution 3281.

³⁵ Pereira R and Gough O "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law" (2013) *Melbourne Journal of International Law* 451 at 456.

³⁶ Pereira and Gough (note 35) at 456 – 457; Dale et al (note 12) at MPRDA-111.

³⁷ Dale et al (note 12) at MPRDA-111.

³⁸ Gordon (note 23) at 144.

³⁹ Gordon (note 23) at 144; Dale et al (note 12) at MPRDA-112.

should not be subjected to regulation by governments that that were deemed to be part of the problem.⁴⁰

The various resolutions and the Charter all seek to ensure permanent sovereignty of a state over natural resources within its boundaries. However, the scope of the principle of permanent sovereignty over natural resources adapted through the decades as a result of conflicting interests between developed and developing states. At the heart of the conflict appears to be the tension between the need to exploit resources, to promote economic growth, and the dependence on international investors to do the exploiting. Developing countries recognised that natural resources must be exploited for the benefit of their people. The reality was, however, that exploitation of resources was led by international corporations from developed countries who also had to secure their own interests.

The “Washington Consensus” of 1989⁴¹ was aimed at ending “nationalistic inclinations towards state-led development policies”.⁴² States sought to open the economy to private international entities and to ensure flexible labour markets and World Trade Organisation-ruled trade agreements.⁴³ The Washington Consensus was not accepted with open arms by all developing countries. Some still held the view that it was not reform adopted in the self-interest of developing countries, but rather reform imposed

⁴⁰ Gordon (note 23) at 145.

⁴¹ The economist John Williamson coined these policy considerations the “Washington Consensus”. The Consensus originated from a meeting of Washington-based institutions that addressed struggling countries in Latin America on a number of fundamental policy considerations. Williamson J “What Should the World Bank Think of the Washington Consensus?” (2000) *The World Bank Research Observer* 251 at 251. These ten principles are basically as follows: (1) budget deficits should be small enough to be financed without recourse to the inflation tax; (2) public expenditure should be redirected from politically sensitive areas that receive more resources than their economic return can justify toward neglected fields with high economic returns and the potential to improve income distribution, such as primary education and health and infrastructure; (3) tax reform so as to broaden the tax base and cut marginal tax rates; (4) financial liberalisation involving an ultimate objective of market-determined interest rates; (5) a unified exchange rate at a level sufficiently competitive to induce a rapid growth in non-traditional exports; (6) quantitative trade restrictions to be rapidly replaced by tariffs, which would be progressively reduced until a uniform low rate in the range of 10% to 20% is achieved; (7) abolition of barriers impeding the entry of foreign direct investment; (8) privatisation of state enterprises; (9) abolition of regulations that impede the entry of new firms or restrict competition; and (10) the provision of secure property rights, especially to the informal sector. See Williamson J “The Strange History of the Washington Consensus” (2004-2005) *Journal of Post Keynesian Economics* 195 at 196.

⁴² Gordon (note 23) at 148.

⁴³ Gordon (note 23) at 149.

on them by Washington as representative of the developed countries.⁴⁴ The Washington Consensus was soon viewed as a “neoliberal ideological agenda” imposed on all countries at all time, instead of a list of reforms that were widely thought of as required by a particular geographical region at a particular date in history.⁴⁵

Although adoption of the principle of sovereignty over natural resources was thought to be an important component of strategies to promote economic development of developing countries, many of the countries in whose interests the principle was advanced are still “mired in economic doldrums” and remain excluded from the international economic system.⁴⁶ The one reason advanced for this is that leaders of these countries see the principle as a justification for conferring ownership of natural resources to themselves; it therefore appears to be used as a justification for possible corruption.⁴⁷ One problem is that the resolutions and the Charter are not explicit about the ownership implications of sovereignty over natural resources: it is unclear whether the resources are to be vested in the people of a state, or in their government.⁴⁸ Scholarship on this is divided. Some authorities see a clear distinction,⁴⁹ but other dissenters indicate that there is no difference in situations.⁵⁰ The result of such uncertainty is that the meaning and effect of the principle is diluted: states essentially elect where to vest ownership of natural resources. Sovereignty becomes the basis upon

⁴⁴ Williamson J “The Washington Consensus and Beyond” (2003) *Economic and Political Weekly* 1475 at 1476.

⁴⁵ Williamson (note 44) at 1476.

⁴⁶ Duruigbo (note 12) at 34 – 35.

⁴⁷ Duruigbo (note 12) at 35 – 36 and the examples of Nigeria, Iraq, Angola and Equatorial Guinea mentioned there.

⁴⁸ Duruigbo (note 12) 43.

⁴⁹ E.g. Dale et al (note 12) at MPRDA-110 state that the Declaration was adopted at a time when permanent sovereignty over natural resources was a result of the political and legal call for self-determination and decolonisation. Consequently, the Declaration *per se* distinguishes between “peoples and nations” and “state”. Rights with regard to natural resources vest in the peoples and nations, but control over natural resources vests in the sovereignty of the state.

⁵⁰ Duruigbo (note 12) 37 argues that “peoples” should be understood to mean “the owners of natural resources rather than faceless populations” and that this principle vests permanent sovereignty over natural resources in the peoples. This will help to interpret the government’s role as temporary custodian or trustee over these resources. Others have opined that, by using the word “sovereignty”, the intention was to vest natural resources in states. See Chandler and Sunder “The Romance of the Public Domain” 2004 *California Law Review* 1331 at 1366 where the Convention on Biological Diversity 31 *International Legal Material* 818 was discussed. Article 15(1) of this Convention also recognises the State’s sovereign right over domestic natural resources. See also Duruigbo (n 54) 46, 48 and 50.

which states can claim ownership of petroleum resources, elect only to control petroleum resources or decide to vest ownership and control over petroleum resources in private hands.⁵¹ Sovereignty in and of itself is thus not helpful in addressing the problems faced by resource-rich countries in the developing world.

Designed as a mechanism to protect a state's natural resources from interference by other states, its relevance on the economic plain is limited. Petroleum exploitation in particular is led by powerful international corporations protected whose interests are protected under bi-lateral investment treaties. The imbalance in bargaining power between developing states and these corporations overshadow states' sovereign powers to decide how petroleum resources should be exploited. This may be further exacerbated by weak regulatory regimes that lack transparency, accountability and a proper balance of interests. Other strategies will have to be devised to ensure that the benefits of natural resources accrue to the citizens of resource-rich countries.⁵²

To give proper effect to the principle of permanent sovereignty over natural resources, it is important to ascertain who the rightful owners of resources are, as envisaged by this principle.⁵³ It is, after all, the main thrust of the principle of permanent sovereignty over natural resources to allow states, at the exclusion of other states, to decide where to vest ownership of and control over petroleum resources and to ensure that natural resources are exploited in the interest of national development.⁵⁴

3. Cuius est Solum, Capture and the Main Models of Petroleum Ownership

In line with international law and the principle of permanent sovereignty over natural resources, states may elect where to vest ownership of petroleum resources.⁵⁵

⁵¹ Hammerson (note 8) at 35; Smith (note 5) at 28.

⁵² Duruigbo (note 12) at 36.

⁵³ Duruigbo (note 12) at 36.

⁵⁴ Alramahi (note 14) at §1.31, §1.32 and §1.41.

⁵⁵ The question of who owns petroleum resources only arises in respect of territorial (onshore) land. Petroleum resources located in the territorial sea, exclusive economic zone and continental shelf vest in the state in terms of the principle of permanent sovereignty. See Taverne B *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* 2 ed (2008) Alphen aan den Rijn Kluwer Law International at 120. See also Redgwell C and Rajamani L "Energy Underground: International Law" in Zillman

Ownership of petroleum *in situ* (petroleum as occurring under natural conditions on or in the land)⁵⁶ normally resorts under one of two extremes, namely that of private ownership and state ownership. By way of example, in the United States of America – a pioneer in the petroleum industries⁵⁷ – private ownership over petroleum resources is generally acknowledged.⁵⁸ The USA is an exception, however. Generally, ownership of petroleum resources is either vested in the state, or the state has exclusive control over these resources.⁵⁹ A study of the exception in this case assists understanding of the rule. In the paragraphs below the basic rules applicable to ownership and control of petroleum are discussed, both from the setting in which they were first formulated, and then from the exceptional vantage point of the US experience. This paves the way for a deeper inquiry into the appropriateness of the South African and Namibian regulatory frameworks.

Roman Law regarded minerals as the fruits of the land⁶⁰ or as having acceded to the land.⁶¹ They were considered to vest in the owner of the land.⁶² This is referred to as the accession system,⁶³ which applied in Roman law of the Republic and early empire. In the later Empire, as a majority of mines and mineral deposits outside Italy were acquired through conquest, they became the property of the Republic and later the Empire. It was eventually accepted that the state held primary control over all mineral resources.⁶⁴ This became known as the regalian system, which refers to a system which regards ownership of all or some minerals as the property of the ruler or state or under

DN, McHarg A, Bradbrook A and Barrera-Hernandez L (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) Oxford Oxford University Press at 118.

⁵⁶ Taverne (note 55) at 120.

⁵⁷ The first oil well was drilled by Colonel Drake in what became known as Oil Creek, near Titusville, Pennsylvania. See Downey M *Oil 101* (2009) La Vergne Wooden Table Press LLC at 2.

⁵⁸ Hammerson (note 8) at 36; Smith E "Ownership of Mineral Rights" in *Materials on International Petroleum Transactions* (2000) Denver, Rocky Mountain Mineral Law Foundation at 248–249; Daintith (note 3) at 7. The position in the United States will be discussed in more detail below.

⁵⁹ Onorato W and Park J, "World Petroleum Legislation: Frameworks that Foster Oil and Gas Development" 2001-2002 (39) *Alberta Law Review* 70 at 73–74.

⁶⁰ Kaser M *Roman Private Law* 3ed (1980) Pretoria University of South Africa at §18.III.

⁶¹ Ely N and Pietrowski Jr RF "Changing Concepts in the World's Mineral and Petroleum Development Laws" (1976) *Brigham Young University Law Review* 9 at 11.

⁶² Wessels JW *History of the Roman-Dutch Law* (1908) Grahamstown African Book Company Limited at 486.

⁶³ Daintith (note 3) at 308.

⁶⁴ Ely and Pietrowski Jr (note 61) at 11.

the ruler or state's exclusive control.⁶⁵ The regalian system is characterised by a distinction between the ownership of the surface and ownership of the subsoil.⁶⁶ The character of the state's ownership, however differed from jurisdiction to jurisdiction. Some vest minerals in the absolute ownership of the state – referred to by some as a “dominial” system.⁶⁷ Other jurisdictions, referred to by some as “true” regalian systems, vested control (but not necessarily absolute ownership) over all mines in the state.⁶⁸

Roman-Dutch Law generally followed early Roman Law. The principle *cuius est solum, eius est usque ad coelum et ad inferos* was accepted and the owner of the land was regarded as the owner of everything above and below the surface of the land.⁶⁹

Although scope does not allow a detailed exposition of the origins of the *cuius est solum* rule,⁷⁰ a comparative review of available sources reveal that the rule is almost universally endorsed, regardless of the system applicable. In the English common law the rule was first referred to in *Bury v Pope*,⁷¹ and in Blackstone's *Commentaries*,⁷² and

⁶⁵ Ely and Pietrowski Jr (note 61) at 11; Daintith (note 3) at 309.

⁶⁶ Campbell N "Principles of Mineral Ownership in the Civil Law and Common Law Systems" 1956-1957 (31) *Tulane Law Review* 303 at 306.

⁶⁷ Campbell (note 66) at 307.

⁶⁸ Campbell (note 66) at 307.

⁶⁹ Voet XLI.1.13; Campbell (note 66) at 304; Daintith (note 3) at 308.

⁷⁰ The *cuius est solum* principle probably stems from Roman law or Jewish law but its origins may be traced to a 13th century gloss of Accursius on D.viii.2.1. See further Bradbrook A "The Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land" 1987-1988 (11) *Adelaide Law Review* 462 at 462; Gonzáles JJ "Civil Law Traditions in Latin American Countries" in Zillman DN, McHarg A, Bradbrook A and Barrera-Hernandez L (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) Oxford Oxford University Press at 62. *Commissioner for Railways and others v Valuer-General* [1973] 3 All ER 268 at 277; *Lord Bernstein of Leigh v Skyviews & General Ltd* [1977] 2 All ER 902 at 905.

⁷¹ *Bury v Pope* (1588) Cro Eliz at 118. See *Commissioner for Railways and others v Valuer-General* [1973] 3 All ER 268 at 277

⁷² Blackstone *Commentaries* (1766) vol II at 18, where he states as follows: "Land hath, in it's legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance."

later confirmed in *Acton v Blundell*.⁷³ Still, the use of this rule in English law is criticised as “imprecise”.⁷⁴ The principle was mainly used in analyses involving structures erected on adjoining lands and not minerals or petroleum.⁷⁵ In respect of petroleum, the Privy Council was prepared to assume in *Borys v Canadian Pacific Railway Co* (without expressly mentioning the principle of *cuius est solum*) that the owner of the land is the owner of gas *in situ* below the surface of the land.⁷⁶ Under modern English law the default position of *cuius est solum* is qualified to a large extent by statutory law.⁷⁷ For example, the Petroleum Act 1998 vests ownership of all petroleum in the United Kingdom Continental Shelf in the Crown.⁷⁸

The United States of America followed the English approach.⁷⁹ With the advent of air travel, condominium ownership and subsurface resource exploitation, it quickly became clear that the *cuius est solum* rule cannot be applied rigidly and that it has to be qualified.⁸⁰ This was certainly the case when courts had to determine rights in respect of underground water. As a liquid, water is migrating in nature and does not respect man-made boundaries. The courts were faced with the question of how this affected ownership.⁸¹ Similarly, when the question of ownership of subsurface petroleum first arose in the United States of America,⁸² the court also had to recognise the uniqueness of the nature of oil and held that the owner of the land should be considered owner of the oil he obtains when he constructs a suitable well.⁸³

⁷³ *Acton v Blundell* (1843, Exch) 12 M. & W. 324. The court confirmed the principle of *cuius est solum* and stated that an owner is entitled to exert his ownership in respect of everything above and below the land. If, while exercising his rights of ownership, he intercepts or drains his neighbour's water or water supply, then that cannot be a cause of action for the neighbour. *Acton* at 353.

⁷⁴ *Commissioner / Valuer-General* (note 70) at 278.

⁷⁵ *Lord Bernstein* (note 70) at 905.

⁷⁶ *Borys v Canadian Pacific Railway Co and Another* [1953] 1 All ER 451 at 458: “For the purpose of their decision their Lordships are prepared to assume that the gas whilst *in situ* is the property of the appellant even though it has not been reduced into possession...”

⁷⁷ *Hammerson* (note 8) at 38.

⁷⁸ See also Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.30.

⁷⁹ *Smith* (note 5) at 39.

⁸⁰ Summers W “Property in oil and gas” 1919 (29) *The Yale Law Journal* 174 at 174; Campbell (note 66) at 304; Hobson J “Ownership of Oil and Gas in Place” 1924-1925 (13) *Kentucky Law Journal* 152 at 152.

⁸¹ *Summers* (note 80) at 174.

⁸² *Hail v Reed* (1854) 54 Ky. 383.

⁸³ *Hail* (note 82) at 392.

The case of *Hail v Reed*⁸⁴ is considered the first case in the United States that deals with the nature of a landowner's interest in petroleum in respect of his land.⁸⁵ The Supreme Court in Pennsylvania recognised that the absoluteness of ownership espoused by the *cuius est solum* doctrine is inadequate for water, oil and gas⁸⁶ and found it difficult to apply the concept of ownership to a migrating substance.⁸⁷ The court described water, oil and gas minerals as *ferae naturae*.⁸⁸ They belong to the owner of the land for as long as they are within the boundaries of his land and under his control but the owner loses ownership as soon as they escape the boundaries of his land.⁸⁹ So an owner of land will lose ownership of petroleum if the petroleum escapes the owner of the land because someone else drills on their own property and, by their action, denudes the other owner.⁹⁰ The Supreme Court of Kentucky, in 1934, also likened gas to animals *ferae naturae* and claimed that the gas company lost ownership of their gas when they pumped it into a subsurface stratum.⁹¹ Other cases followed, comparing oil and gas to animals, birds, water, springs, air and other minerals.⁹² None of these, however, claimed the state to be the owner of the petroleum.⁹³

The abundance of analogies may be ascribed to an earlier misunderstanding of the nature of petroleum occurrence.⁹⁴ It was only later realised that petroleum migrates in specific patterns – as described in Chapter Two – and does not flow aimlessly underground.⁹⁵ By likening petroleum to water and wild animals, courts came to the conclusion that a landowner does not have ownership of petroleum and only acquired title once this resource was reduced to possession.⁹⁶ By adopting this position, a landowner was also deprived of any protectable interest in petroleum that were drained

⁸⁴ *Hail* (note 82) at 383.

⁸⁵ Anderson OL, Dzienkowski JS, Lowe JS, Peroni RJ, Pierce DE and Smith EE *Hemingway Oil and Gas Law and Taxation* (2004) St Paul Thomson West at 29.

⁸⁶ *Westmoreland Natural Gas Co v De Witt* (1889) 130 Pa. St. 235 at 249; Summers (note 80) at 177.

⁸⁷ Anderson et al (note 85) at 29.

⁸⁸ *Westmoreland* (note 86) at 249; Summers (note 80) at 177.

⁸⁹ *Westmoreland* (note 86) at 249; Summers (note 80) at 177.

⁹⁰ *Westmoreland* (note 86) at 249; Summers (note 80) at 177.

⁹¹ *Hammonds v Central Kentucky Natural Gas Company* 255 Ky. 685 (1934) at 689.

⁹² DCG "The ownership of natural gas and some real property concepts" 1950 (36) *Virginia Law Review* 947 at 949.

⁹³ DCG (note 92) at 949.

⁹⁴ Woodward M "Ownership of Interests in Oil and Gas" 1965 (26) *Ohio State Law Journal* 353 at 353–354; Anderson et al (note 85) at 29.

⁹⁵ See Chapter Two above.

⁹⁶ Anderson et al (note 85) at 30.

from his land from elsewhere.⁹⁷ The comparison to water and wild animals was not, however, sufficient, as petroleum travelled within the boundaries of fixed reservoirs and courts eventually disregarded the analogy.⁹⁸

Today, in the United States, two different approaches may be discerned at state level. On the one hand, *cuius est solum* applies and affords property (ownership) interests in petroleum to landowners.⁹⁹ In states adhering to this approach, the owner of the land is the owner of the petroleum beneath the surface of the land.¹⁰⁰ Some authorities refer to this theory of ownership as “absolute”.¹⁰¹ On the other hand, some states do not recognise *ownership* of petroleum in situ, but merely a right of the landowner to search for and extract petroleum.¹⁰² In these states landowners lose their exclusive right to the resource as soon as the resources moved out of the landowner’s boundaries, either through migration or extraction.¹⁰³ Full ownership of the petroleum is acquired only once it is extracted.¹⁰⁴ Landowners could grant the right to extract to others.¹⁰⁵ This view is supported by the Supreme Court of the United States.¹⁰⁶

Regardless of which of the two approaches is followed, the rule of capture applies generally in the United States (both in federal and state law).¹⁰⁷ This entails that the owner of land acquires ownership of the petroleum which he produces from wells drilled on his land, regardless of whether the petroleum migrates from neighbouring land.¹⁰⁸ The origins of this rule may be traced back to the case of *Westmoreland & Cambria Natural Gas Co v De Witt*.¹⁰⁹ A number of cases followed, which adopted the rule (with some variation in places).¹¹⁰ The rule of capture is prevalent in others

⁹⁷ Anderson et al (note 85) at 30.

⁹⁸ Anderson et al (note 85) at 30.

⁹⁹ Anderson et al (note 85) at 30 – 31; DCG (note 92) at 950.

¹⁰⁰ DCG (note 92) at 951; Hobson (note 80) at 155.

¹⁰¹ Woodward (note 94) at 357.

¹⁰² Anderson et al (note 85) at 31.

¹⁰³ DCG (note 92) at 951.

¹⁰⁴ Woodward (note 94) at 359.

¹⁰⁵ Anderson et al (note 85) at 34.

¹⁰⁶ Hobson (note 80) at 153 and the authorities stated there.

¹⁰⁷ Daintith (note 3) at 7; Woodward (note 94) at 356; *Coastal Oil and Gas Corp v Garza Energy Trust* Case No. 05-0466 of the Supreme Court of Texas (argued 28.09.2006) (Texas) at 13.

¹⁰⁸ Kramer B and Anderson O "The rule of capture - an oil and gas perspective" 2005 (35) *Environmental Law* 899 at 900.

¹⁰⁹ *Westmoreland Westmoreland* (note 86) 235. See Daintith (note 3) at 20.

¹¹⁰ Daintith (note 3) at 20 – 29, 50

jurisdictions as well.¹¹¹ It has been described as “...a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.”¹¹² The weakness of the rule is that it promotes the practice of drilling as many wells as quickly as possible to be the first to capture the petroleum. This leads to waste and disorder, unnecessary costs and damage.¹¹³ Despite criticisms, the rule of capture retains its grip over the petroleum industry in the United States.¹¹⁴ The rule is based on common law as framed by case law. The US legislature has never attempted to step in and regulate the situation.¹¹⁵

In Latin American countries, the Roman law notion of absoluteness of ownership – which includes ownership of resources in place – was adopted.¹¹⁶ Despite this, most of them specifically exclude hydrocarbons from the ownership of land.¹¹⁷ This position is a result of the influence of the Spanish approach, which is based on the regalian system discussed above.¹¹⁸ Many other jurisdictions across the world also vest ownership of natural resources in the state. This is done either in the country’s constitution, or in a statute¹¹⁹ This is the case for Saudi Arabia,¹²⁰ Iran,¹²¹ Mozambique¹²² and Kuwait.¹²³ All Australian states have legislated petroleum *in situ* to be owned by the Crown.¹²⁴

Namibia also follows the general international trend of vesting natural resources in the state in terms of its Constitution. The Constitution of the Republic of Namibia, 1990 provides that all natural resources on, in or under land vests in the state.¹²⁵ This includes

¹¹¹ Daintith (note 3) at 7.

¹¹² *Coastal Oil and Gas* (note 107) at 13.

¹¹³ Daintith (note 3) at 8 – 13.

¹¹⁴ Daintith (note 3) at 302, with reference to *Coastal Oil and Gas* (note 107).

¹¹⁵ Daintith (note 3) at 13 – 16.

¹¹⁶ Gonzáles (note 70) at 61.

¹¹⁷ Gonzáles (note 70) at 69.

¹¹⁸ Gonzáles (note 70) at 69. In the twentieth century, however, the Latin American civil law systems “...built a complex regime of land property rights based on both the *regalian* and the *domanial* systems of property...” In Mexico, the domanial system has been influential since the 1940s. The Constitution expressly vests all hydrocarbons in the Mexican Nation. See article 27 of the Political Constitution of the Mexican United States and Gonzáles (note 70) at 70.

¹¹⁹ Taverne (note 55) at 120.

¹²⁰ Royal Order No A/91 of the Basic Law of Governance 1992 of Saudi Arabia.

¹²¹ Article 2 of the Petroleum Act of Iran.

¹²² Article 6 of the Petroleum Law 2001 of Mozambique.

¹²³ Article 21 of the Constitution of Kuwait, 1962.

¹²⁴ Bradbrook (note 70) at 468.

¹²⁵ Article 100 of the Constitution of the Republic of Namibia, 1990.

petroleum. Furthermore, the Petroleum (Exploration and Production) Act¹²⁶ states that all rights in respect of petroleum resources are vested in the state as well.

South Africa is an example of where a state has assumed control over petroleum resources without explicitly vesting ownership thereof in the state. South Africa's Constitution is silent as to the ownership of natural resources. South Africa introduces a new concept in respect of ownership and control of petroleum resources, namely custodianship. Under the Minerals and Petroleum Resources Development Act 28 of 2002, petroleum resources vest in the nation and the state is custodian thereof for the benefit of the nation.¹²⁷ This choice of a custodianship model blurs the line between state ownership and private ownership of petroleum resources. It is discussed in more detail in Chapter Five below. What is clear, however, is that control over petroleum resources in South Africa is vested in the state.

Full privatisation of petroleum resources have been criticised as one of the worst abuses, since the state is then getting the worst deal.¹²⁸ Many countries have therefore moved toward some form of state control over petroleum resources. Private ownership of petroleum resources is the exception as almost universally states claim some sort of ownership or control over petroleum.¹²⁹ The largest part of the world's petroleum-producing states has in fact vested ownership or control or both over petroleum resources in the state. An advantage is that vesting the ownership of petroleum resources in the state removes all complexities as regards private ownership of petroleum resources.¹³⁰ Moreover, as this thesis will show, vesting ownership and control of petroleum resources in the state is necessary to ensure shared benefit of these resources for the greater good. The state is in the best position to assert its sovereignty *vis-à-vis* other states.¹³¹

¹²⁶ Petroleum (Exploration and Production) Act 2 of 1991.

¹²⁷ Section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002.

¹²⁸ Stiglitz J "What Is the Role of the State?" in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at 23.

¹²⁹ Gordon G "Petroleum Licensing" in Gordon G, Paterson J and Üşenmez E (eds) *Oil and Gas Law - Current Practice and Emerging Trends* 2 ed (2011) Dundee Dundee University Press at 65.

¹³⁰ Bradbrook (note 70) at 468.

¹³¹ Barnes (note 1) at 281.

4. Allocation of Rights to Petroleum

As the first part of the chapter demonstrates, states have a wide discretion, supported by international law and the principle of permanent sovereignty over natural resources, to determine how their petroleum resources are to be exploited.¹³² States therefore determine how access to their petroleum resources is granted. It is in the interest of states well-endowed with petroleum resources to ensure that these resources are used in such a way that the countries benefit on economic and social development levels.¹³³

As was indicated, the general trend across the globe is to vest ownership, or at least control, of petroleum resources in the state. This is also the case with Namibia and South Africa. Vesting ownership or control of petroleum resources in the state is, however, only one aspect of a petroleum regulatory framework. The second aspect is determining the appropriate authorisation through which access to these resources owned by or under control of the state is granted. Together, these two aspects make up the regulatory framework for petroleum resources in South Africa and Namibia. Determining the appropriate authorisation is vital for a petroleum-rich country to reap the benefit of its petroleum resources.¹³⁴

States can choose to exploit their petroleum resources through various ways. They may exploit these resources through a state petroleum company only or invite private petroleum companies to do the exploitation or use of combination of these two systems.¹³⁵ The actual extent of state participation in the petroleum industry varies from one jurisdiction to another.¹³⁶ The extent of state regulation of the of the petroleum industry within a host country may also vary, depending on where petroleum is located. Some states are actively involved in the exploitation of their petroleum resources through a national petroleum company.¹³⁷ Other states may exploit its resources by inviting private companies to develop these resources.¹³⁸ Some states may

¹³² See also Hammerson (note 8) at 48.

¹³³ Radon J "The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-sharing Agreements" in Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Society Institute at 61.

¹³⁴ Radon (note 133) at 61.

¹³⁵ Radon (note 133) at 61–62.

¹³⁶ Gordon (note 129) at 65.

¹³⁷ Gordon (note 129) at 65.

¹³⁸ Radon (note 133) at 62.

also exploit its resources through joint operations between the state petroleum company and a private company.¹³⁹ This normally happens in Namibia, where the national petroleum company is a party to a petroleum licence.

The extent of state participation in petroleum exploitation and the choice of authorisation for granting access to petroleum resources are influenced by the fact that petroleum exploitation involves great risk and is capital intensive.¹⁴⁰ States often do not have the financial means or technological expertise to exploit the petroleum resources within their territory,¹⁴¹ and hence choose to delegate the exploitation of petroleum resources to other entities.¹⁴² The rights of these entities to the petroleum resources depend on the type of authorisation used by the state to grant the rights to exploit the petroleum within its territory.¹⁴³ Some states may for instance grant exclusive rights to the entity to exploit the petroleum resources through licences or concessions, while others may enter into an agreement with the entity to exploit the resources, such as a production sharing agreement or a service contract.¹⁴⁴ A hybrid legal instrument, combining elements of exclusive rights with elements of an agreement, is also possible.¹⁴⁵

Aside from the fact that petroleum exploitation involves great risk and is capital intensive, a state must also keep public interest in mind when granting access to petroleum.¹⁴⁶ So, for example, a state must be able to use its regulatory powers to prevent abuse of the resource, damage to the environment and human rights abuse.¹⁴⁷ A state must also use its regulatory power to acquire funds for social and economic

¹³⁹ Radon (note 133) at 62.

¹⁴⁰ See also Easo J "Licences, Concessions, Production Sharing Agreements and Service Contracts" in Picton-Turbervill G (ed) *Oil and Gas: A Practical Handbook* (2009) London Globe Business Publishing Ltd at 2.

¹⁴¹ Easo (note 140) at 2.

¹⁴² Easo (note 140) at 2; Gordon (note 129) at 66.

¹⁴³ Omorogbe Y and Oniemola P "Property Rights in Oil and Gas under Domanial Regimes" in McHarg A, Barton B, Bradbrook A and Godden L (eds), *Property and the Law in Energy and Natural Resources* (2010) Oxford Oxford University Press at 115.

¹⁴⁴ Gordon (note 129) at 66; Easo (note 140) at 2; Tordo S, Johnston D and Johnston D *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues* (2010) Washington The International Bank for Reconstruction and Development / The World Bank at 8.

¹⁴⁵ Gordon (note 129) at 66.

¹⁴⁶ Radon (note 133) at 61-62.

¹⁴⁷ See for example Radon (note 133) at 62.

development.¹⁴⁸ By the same token, a state must be careful not to over-regulate petroleum so that potential investors are discouraged.¹⁴⁹

The authorisation used to allocate rights to third parties to exploit petroleum regulates the relationship between the state and petroleum companies.¹⁵⁰ It further regulates the extent to which a state may be involved in the exploitation of its resources and is an important consideration when determining the degree of benefit for the nation from the exploitation of its resources.¹⁵¹ Before discussing the different authorisations available for the allocation of rights to petroleum, it is necessary to look at what factors may be taken into account by a state when determining what legal instruments to use.

4.1 Factors for Determining the Appropriate Authorisation

The determination of the appropriate system of granting rights to petroleum is a political issue.¹⁵² The extent to which states are involved in the exploitation of petroleum resources depends on the type of authorisation used to authorise exploitation of petroleum resources. This, in turn, depends on various factors, such as risk, the cost of exploration and production and the allocation of benefit of exploitation. Each of these deserves some further attention.

In the first place, the allocation of risk is an important issue for a state to take into account when deciding what legal instrument to prefer. While every business endeavour will have its risks, the risks involved in petroleum exploitation are particularly great.¹⁵³ Every stage of the exploration and production process faces physical, commercial and political risks.¹⁵⁴

(i) One of the biggest physical risks is the uncertainty of petroleum availability.¹⁵⁵ Despite the advanced methods of petroleum exploration, the only certain way to

¹⁴⁸ Radon (note 133) at 61.

¹⁴⁹ Radon (note 133) at 61.

¹⁵⁰ Easo (note 140) at 2; Alramahi (note 14) at §1.26.

¹⁵¹ See also Blades BW “Production, Politics, and Pre-Salt: Transitioning to a PSC Regime in Brazil” 2011-2012 *Texas Journal of Oil, Gas and Energy Law* 3 at 33.

¹⁵² Hammerson (note 8) at 48.

¹⁵³ Easo (note 140) at 2.

¹⁵⁴ Easo (note 140) at 2.

¹⁵⁵ Kuehne G “Oil and Gas Licencing: Comparative United Kingdom-German Aspects” (1986) *Journal of Energy and Natural Resources Law* 150 at 150.

determine whether a trap will contain petroleum, is to drill for petroleum.¹⁵⁶ Furthermore, even if petroleum is found, the quality of the petroleum remains uncertain until it has been produced.¹⁵⁷ Petroleum exploration and production requires vast capital outlays and if the petroleum quality is very low, production will not be feasible. It is estimated that nine out of ten exploration efforts result in a loss for the petroleum company.¹⁵⁸

(ii) A prevalent commercial risk is the uncertain market price of petroleum. During the exploration phase, neither the state nor the petroleum company has any idea of the price at which petroleum will be sold, if found.¹⁵⁹

(iii) Moreover, as experience in Brazil demonstrate well, petroleum exploitation attracts political attention. Governments understandably are not willing to assume great risk where it is uncertain whether petroleum actually occurs and can be exploited; but where commercially viable petroleum discoveries are made, governments may respond by wanting to share in the benefit of the discovery. In Brazil, after significant offshore petroleum discoveries (“Pre-Salt Deposits”)¹⁶⁰ were found, the finance minister argued for changing the concession system to a production sharing system.¹⁶¹ Launching a major overhaul of the legal regime relating to the offshore Pre-Salt deposits and other strategic areas, government responded by giving effect to the minister’s proposal.¹⁶²

The second factor for determining the appropriate authorisation for granting access to petroleum is the cost of exploration and production.¹⁶³ Petroleum exploitation is capital intensive.¹⁶⁴ The exploration phase does not generate a profit and is intended solely for locating a discovery of petroleum. If no discovery of petroleum is made, the petroleum

¹⁵⁶ See Chapter Two above.

¹⁵⁷ Easo (note 140) at 2.

¹⁵⁸ Radon (note 133) at 62, with reference to a report entitled *Time for Transparency: Coming Clean on Oil, Mining and Gas Revenues* published by Global Witness in March 2004.

¹⁵⁹ Tordo, Johnston and Johnston (note 144) at x.

¹⁶⁰ Blades (note 151) at 32. It is referred to as “Pre-Salt” deposits because the oil is trapped beneath a layer of salt.

¹⁶¹ Easo (note 140) at 28.

¹⁶² Blades (note 151) at 32–33.

¹⁶³ See for example Moss GC “Contract or Licence? Regulation of Petroleum Investment in Russia and Foreign Legal Advice” (1998) *Journal of Energy and Natural Resources Law* 186 at 188.

¹⁶⁴ Bentham RW “A Petroleum Regime: Background and Legalities” (1992-1993) *Houston Journal of International Law* 489 at 489.

company suffers a great loss.¹⁶⁵ A discovery of petroleum cannot be guaranteed. Furthermore, even if petroleum is found, it may not be a profitable venture to exploit the petroleum.¹⁶⁶ The authorisation chosen by the state regulating access to petroleum resources must address the allocation of risk. It is also important for the state who wishes to participate in the exploitation of petroleum resources to determine to what extent it will participate in sharing in the risks of petroleum exploration and production.

Aside from the risk-issue and the cost of exploration and production, another factor that must be taken into account is the allocation of benefit. When deciding about granting of rights to petroleum, states must determine how profits (often called “rents”)¹⁶⁷ must be shared.¹⁶⁸ A host country will want to ensure that it receives some benefit from the exploitation of its petroleum, while the entity undertaking the exploitation will seek to ensure maximum reward for the risks it bears in carrying out the work.¹⁶⁹

Host countries may lack high-tech equipment and requisite skills to exploit petroleum resources.¹⁷⁰ As already indicated,¹⁷¹ there are many different, specialised ways of exploring for petroleum, but the spread of petroleum resources throughout the world is such that most petroleum resources are found in poorer countries.¹⁷² The poor host countries therefore tend to delegate this task to a petroleum company with the necessary equipment and skills. This requires heavy foreign investment. If a host country does not have the necessary equipment and skill to exploit petroleum resources, it needs to attract foreign investors who possess the necessary skill and equipment to do the exploitation. The authorisation that a host country chooses to grant access to petroleum needs to be attractive for foreign investors while at the same time ensuring that not all the benefit of these resources are allocated to petroleum company.

¹⁶⁵ See for example Everett JE “Some Decision Problems in Petroleum Exploration” (1978) *Interfaces* 25 at 25.

¹⁶⁶ Moss (note 163) at 188; Easo (note 140) at 2.

¹⁶⁷ See Chapter One above.

¹⁶⁸ Radon (note 133) at 62.

¹⁶⁹ Gordon (note 129) at 66.

¹⁷⁰ Tordo, Johnston and Johnston (note 144) at x.

¹⁷¹ See Chapter Two.

¹⁷² See Chapter One.

Finally, it is of utmost importance for oil companies that they acquire good title to the petroleum resources.¹⁷³ Good title enables the holder of a right to encumber it by tendering it as security for a loan, thus raising finance. Good title entails that a petroleum company can use the rights that it acquires in respect of petroleum resources to raise finance. For example, in jurisdictions where a petroleum company acquires an exclusive right to petroleum resources, the petroleum company can typically encumber this right to raise finance.¹⁷⁴

When a country determines what authorisations will be used to grant access to petroleum, it must do so with the above factors in mind. The chosen authorisation must be determined with these factors in mind and must attempt to address these factors.

4.2 Authorisations in respect of petroleum

With the above factors in mind, the authorisation for allocating rights to petroleum can be classified in two groups: exclusive rights and contractual arrangements. All arrangements in these two groups are aimed at accomplishing the same goal, but conceptually they differ from one another.¹⁷⁵ There are also practical differences between exclusive rights and contractual arrangements, pertaining to the level of control by the petroleum company and the extent of state involvement.¹⁷⁶ The main differences between exclusive rights and contractual arrangements pertain to where ownership vests and to whom risk and benefit are allocated. In the case of exclusive contracts, ownership of petroleum produced vests in the holder of the exclusive right; while the state generally retains ownership of petroleum produced in case of contractual arrangements.¹⁷⁷ With exclusive rights, the petroleum company will assume most of the risk, but if a commercially viable discovery is made, it will enjoy the greatest benefit.¹⁷⁸ Under contractual arrangements, risks and benefit are usually shared between the state and the petroleum company.

¹⁷³ Hammerson (note 8) at 32.

¹⁷⁴ See paragraph 3.3.5 of Chapter Five below.

¹⁷⁵ Dzienkowski J "Concessions, Production Sharing, and Participation Agreements for Developing a Country's Natural Resources" in *Materials on International Petroleum Transactions* 2 ed (2000) Denver Rocky Mountain Mineral Law Foundation at 411.

¹⁷⁶ Dzienkowski (note 175) at 411.

¹⁷⁷ Taverne (note 55) at 117; Blades (note 21) at 39.

¹⁷⁸ Radon (note 133) at 65.

4.2.1 Exclusive Rights

Exclusive rights to petroleum are either granted by the state to petroleum companies through concessions or through licences.¹⁷⁹ Under both a concession and a licensing regime, ownership of the petroleum passes to the holder of the concession or licence at the well head.¹⁸⁰ Once extracted, the government imposes royalty and taxes on the produced petroleum.¹⁸¹

Some authorities consider a licence to be a type of modern concession.¹⁸² There are, however, subtle differences. Concessions are typically used in underdeveloped or unstable legal systems. With concessions, host states are more likely to impose obligations on petroleum companies to use local employment, provide training and transfer technology.¹⁸³

4.2.1.1 Concessions

Concession regimes are used by nearly half of all countries world-wide.¹⁸⁴ Notable examples include the United Kingdom and the United States.¹⁸⁵ Brazil is another example,¹⁸⁶ as is Norway.¹⁸⁷ Here, the concession regime still applies to areas other than the Pre-Salt Deposits.¹⁸⁸

There are mainly two types of concessions: traditional concessions and modern concessions.¹⁸⁹ The traditional concession is the oldest type of petroleum arrangement between a government and petroleum companies. Traditional concessions were typically quite large, sometimes granted over the whole country, and were usually granted for a very long period.¹⁹⁰ They operated mostly in favour of the petroleum

¹⁷⁹ Tordo, Johnston and Johnston (note 144) at 8.

¹⁸⁰ Blades (note 151) at 34; Easo (note 140) at 29 and 33.

¹⁸¹ Blades (note 151) at 34; Radon (note 133) at 65.

¹⁸² See for example Omorogbe *Y Oil and Gas Law in Nigeria* (2003) Lagos Malthouse Press Limited at 40; Tordo, Johnston and Johnston (note 144) at 9.

¹⁸³ Easo (note 140) at 34.

¹⁸⁴ Tordo, Johnston and Johnston (note 144) at 9.

¹⁸⁵ Dzienkowski (note 175) at 411.

¹⁸⁶ Easo (note 140) at 34.

¹⁸⁷ Moss (note 163) at 187.

¹⁸⁸ See paragraph 2 above.

¹⁸⁹ Omorogbe (note 182) at 39; Easo (note 140) at 33.

¹⁹⁰ Omorogbe (note 182) at 39; Tordo, Johnston and Johnston (note 144) at 9.

company.¹⁹¹ The host country assumed very little risk as regards petroleum exploitation, but enjoyed very little benefit.¹⁹² Normally, all that the host country gained were concession costs and specified taxes.¹⁹³ The modern concession also grants an exclusive right over a specified area to the holder of the concession, but the area is typically smaller and the concession is granted for a shorter period.¹⁹⁴ As with traditional concessions, the host country only benefits through fees, taxes and royalty.¹⁹⁵

A concession therefore grants the holder thereof the exclusive right to explore for and produce petroleum within a specified area for a specified period of time.¹⁹⁶ The petroleum company carries the risks associated with exploration and production while the state is paid compensation through royalty and taxes.¹⁹⁷ Ownership of petroleum *in situ* typically remains vested in the state and only passes to the petroleum company at the wellhead.¹⁹⁸

Concessions typically take the form of concession agreements, which contains the terms and conditions upon which the concession is granted.¹⁹⁹ Concession agreements are not merely administrative instruments and are therefore not capable of unilateral amendment by the host state.²⁰⁰ Despite this, the host state retains considerable liberty to modify those terms that are fixed by legislation, although in practice a stable investment environment motivates states not to abuse this prerogative.²⁰¹

4.2.1.2 Licencing

The licencing regime is used today in many countries, including the United Kingdom, Norway, Russia, the Netherlands, Denmark and Namibia.²⁰² Some jurisdictions refer to a lease regime, rather than a licensing regime.²⁰³ A licence is an authorisation granted

¹⁹¹ Easo (note 140) at 33

¹⁹² Omorogbe (note 182) at 39.

¹⁹³ Omorogbe (note 182) at 39.

¹⁹⁴ Omorogbe (note 182) at 40; Tordo, Johnston and Johnston (note 144) at 9.

¹⁹⁵ Omorogbe (note 182) at 40 – 41.

¹⁹⁶ Tordo, Johnston and Johnston (note 144) at 9.

¹⁹⁷ Tordo, Johnston and Johnston (note 144) at 9.

¹⁹⁸ Tordo, Johnston and Johnston (note 144) at 9.

¹⁹⁹ Easo (note 140) at 33.

²⁰⁰ Easo (note 140) at 34.

²⁰¹ Moss (note 163) at 187; Tordo, Johnston and Johnston (note 144) at 9.

²⁰² See for example Dzienkowski (note 175) at 435; Easo (note 140) at 29 – 33; Alramahi (note 14) at §1.78.

²⁰³ Easo (note 140) at 29.

to a petroleum company by the state which entitles the petroleum company to exploit petroleum over a certain area for a certain period of time.²⁰⁴ It may either authorise the petroleum company to explore for petroleum or to produce petroleum, or both.²⁰⁵ A licence fee or royalty, or both a licence fee and a royalty, is normally paid to the state in exchange for the licence.²⁰⁶

Licence conditions are normally reflected in national legislation. Nevertheless, many jurisdictions (such as the United Kingdom) consider a licence to be a contractual relationship between the host state and the petroleum company.²⁰⁷ Although the regulatory context is normally reflected by considerable degrees of state discretion as to the conditions of the licence, the underlying contractual relationship means that the licence conditions may not be changed unilaterally by the state.²⁰⁸

4.2.2 Contractual Arrangements

Contractual arrangements can be classified as either risk-bearing or non-risk-bearing.²⁰⁹ This categorisation indicates whether the contractor bears the financial responsibility of exploring for and producing petroleum.²¹⁰ With non-risk-bearing contracts (such as a pure service contract), the contractor's activities are funded, regardless of the outcome.²¹¹ With a risk-bearing contract (such as a production-sharing contract), the contractor has to invest its own funds to exploit the petroleum under the contract.²¹² A risk-services contract on the other hand is a risk-bearing service contract – a combination of a risk-bearing and service contract.²¹³

4.2.2.1 Production Sharing Contracts

A production-sharing agreement is concluded between a petroleum company or a consortium of petroleum companies and the state.²¹⁴ Ownership of the petroleum

²⁰⁴ Easo (note 140) at 29; Taverne (note 55) at 117.

²⁰⁵ Taverne (note 55) at 117; Dzienkowski (note 175) at 435.

²⁰⁶ Easo (note 140) at 29.

²⁰⁷ Easo (note 140) at 30.

²⁰⁸ Easo (note 140) at 30.

²⁰⁹ Taverne (note 55) at 116.

²¹⁰ Taverne (note 55) at 116.

²¹¹ Taverne (note 55) at 116–117.

²¹² Taverne (note 55) at 116.

²¹³ Easo (note 140) at 38.

²¹⁴ Tordo, Johnston and Johnston (note 144) at 10.

resources remains vested in the state,²¹⁵ who hires a petroleum company as contractor to conduct exploration and production operations in exchange for a share from the revenues received from the produced petroleum or a share in the produced petroleum, or both.²¹⁶ The state may be a party, either as itself (through government) or through a state authority or the national oil company.²¹⁷

Under a production-sharing agreement, a petroleum company (or consortium) is granted the right to explore for and produce petroleum within a specified area and for a limited time.²¹⁸ The petroleum company carries the bulk of the financial risks of exploration and production.²¹⁹ The production sharing contract provides for the percentage of production which the petroleum company may keep as compensation for services performed.²²⁰ The exploration, development and operating costs incurred by the petroleum company are recouped by the company by selling a percentage of post-royalty production known as “cost oil”. The remaining oil is known as “profit oil”, the production of which is shared between the parties in accordance with the formulae defined in the agreement and applicable legislation.²²¹ Ownership of the petroleum, however, only passes to the petroleum company at the delivery or export point, as it is defined in the agreement.²²²

In some instances the national oil company may opt to participate in the consortium as an interest holder in the contract, in which case it will contribute part of its profits as “share capital” to the consortium.²²³ Often, the state has the cost of its initial contribution “carried” by the petroleum companies.²²⁴ This free-carry is later repaid by the state to the petroleum company from its future profits under the production-sharing contract.²²⁵ This is a viable arrangement where the host country does not have the

²¹⁵ Blades (note 151) at 39; Radon (note 133) at 68.

²¹⁶ Easo (note 140) at 35.

²¹⁷ Tordo, Johnston and Johnston (note 144) at 10.

²¹⁸ Tordo, Johnston and Johnston (note 144) at 10.

²¹⁹ Radon (note 133) at 68.

²²⁰ Blades (note 151) at 39.

²²¹ Blades (note 151) at 39; Tordo, Johnston and Johnston (note 144) at 10.

²²² Tordo, Johnston and Johnston (note 144) at 10.

²²³ Radon (note 133) at 68.

²²⁴ Radon (note 133) at 68.

²²⁵ Radon (note 133) at 68.

financial or technical capabilities to contribute to the exploitation of the petroleum resources.

The production-sharing contract has appealed to growing nationalist states in post-colonial areas.²²⁶ Retaining formal ownership of the petroleum resources is an important factor for countries keen on protecting sovereignty over their petroleum resources.²²⁷ The benefit it actually receives, however, may not necessarily be more than under other systems.²²⁸ Even the free-carry that it may receive has to be repaid out of its profit share. In Russia, for example, the initial enthusiasm with which the state embraced the production-sharing regime quickly turned into dissatisfaction because of the unsatisfactory nature of the actual profit-sharing during times of high energy prices. Steps were then taken by the state to reassert control over its petroleum.²²⁹

Proper negotiation is key in a production-sharing agreement. If the state does not wish to participate, the petroleum company will try to bargain a greater share.²³⁰ If the state wishes to participate, it must try to negotiate the most favourable arrangement with the petroleum company. The state is also put in a potential position of conflict: since it shares directly in the profits, it has to be careful not to place its desire for high profits above other interests, such as environmental interests.²³¹

4.2.2.2 Service Contracts

Where service contracts apply, petroleum at all times vest in the state,²³² unless the service contract stipulates that the petroleum company is entitled to a share.²³³ The state may approach petroleum companies to conduct exploration and production services within a specified area and for a specified period. A service contract is then concluded between the state and the petroleum company for these services.²³⁴ Service contracts are typically used in countries with substantial capital at their disposal, but

²²⁶ Easo (note 140) at 35.

²²⁷ Easo (note 140) at 35.

²²⁸ Easo (note 140) at 35.

²²⁹ Easo (note 140) at 37.

²³⁰ Radon (note 133) at 68.

²³¹ Radon (note 133) at 70 – 71.

²³² Easo (note 140) at 37 – 38; Alramahi (note 14) at §1.71.

²³³ Tordo, Johnston and Johnston (note 144) at 10.

²³⁴ Easo (note 140) at 38.

where there are strong elements of nationalism, such as Kuwait, Saudi Arabia and Iran.²³⁵ They are also used quite often in the United States.²³⁶

There are two types of service contracts. The first is a pure service contract. Under pure service contracts, a petroleum company is contracted to perform certain services as defined in the services agreement. In return, the state pays a petroleum company a fee.²³⁷ The role of the petroleum company is that of a mere contractor.²³⁸ Pure service contracts are rare and the more prominent example is the Iranian buy-back arrangements.²³⁹ In terms of these arrangements, the petroleum company funds the investment costs and implement the exploration and production under a service contract entered into with the local or state-owned company. The oil company in return receives remuneration from the sale of petroleum.²⁴⁰ Recently, as part of a politically sensitive reconstruction of the oil industry, certain regions of Iraq have used pure service contracts.²⁴¹

The second type of service contract is a risk services contract and is specifically designed for developing petroleum reserves.²⁴² It is most widely used in Latin America.²⁴³ Under this type of contract, the petroleum company carries the costs and risks of all exploration and development of the petroleum resources.²⁴⁴ If no petroleum is found, then the petroleum company is not compensated.²⁴⁵ However, if petroleum is found and can be produced in commercial quantities, the expenses and operating costs incurred by the petroleum company will be treated as a loan by the petroleum company to the state.²⁴⁶ This may be recovered in various ways, including payments in cash or a share of the marked value of the produced petroleum.²⁴⁷

²³⁵ Easo (note 140) at 38.

²³⁶ Smith EE “From Concessions to Service Contracts” 1991-1992 (27) *Tulsa LJ* 493 at 519.

²³⁷ Easo (note 140) at 38; Smith (note 236) at 519.

²³⁸ Easo (note 140) at 38.

²³⁹ Tordo, Johnston and Johnston (note 144) at 10.

²⁴⁰ Easo (note 140) at 39.

²⁴¹ Hammerson (note 8) at 49.

²⁴² Smith (note 236) at 519.

²⁴³ Smith (note 236) at 519.

²⁴⁴ Easo (note 140) at 38.

²⁴⁵ Easo (note 140) at 38.

²⁴⁶ Easo (note 140) at 38.

²⁴⁷ Easo (note 140) at 38; Tordo, Johnston and Johnston (note 144) at 10.

4.3. Allocation Regimes and Access

The method for allocating rights to petroleum is a significant issue in evaluating a petroleum regime.²⁴⁸ It is necessary to distinguish between an allocation regime and legal instruments used to grant access to petroleum resources. Allocation regimes refer to the systems within which access to petroleum is granted. So, while the authorisations used to grant access to petroleum resources deal with *what* rights to petroleum is granted, allocation regimes deal with *how* these rights are granted.²⁴⁹ Within a particular allocation regime, different instruments are used to grant access to petroleum.²⁵⁰ The allocation regime under which a state negotiates the right authorisation is important to the state's efforts to reap the benefits of its petroleum resources.²⁵¹ The allocation regimes generally resort under one of two types, namely open-door systems or licencing rounds.²⁵²

With an open-door system, petroleum companies obtain rights to exploit petroleum by negotiating with the state. Interested parties may at any time submit an expression of interest in respect of a specific area.²⁵³ The petroleum company and the state then enter into negotiations as to the terms and conditions upon which the rights to search for and extract petroleum are to be granted.²⁵⁴ Normally, there is no predetermined set of criteria upon which rights are to be granted. As a result, states have wide discretion whether to grant rights to petroleum and the terms and conditions upon which those rights are to be granted.²⁵⁵

Licensing rounds either take the form of auctions or an administrative procedure based on a predetermined set of criteria. Where licensing rounds take the form of administrative procedures, licenses are allocated through an administrative process based on a predefined set of criteria.²⁵⁶ With auctions, licences are awarded to the

²⁴⁸ Cawood F "Allocation of Petroleum Development Rights in South Africa: A Comparison with Current International Practices" (2006) Research Paper presented as part of LLM, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee at 7.

²⁴⁹ See for example Cawood (note 248) at 8.

²⁵⁰ Tordo, Johnston and Johnston (note 144) at 12.

²⁵¹ Radon (note 133) at 61.

²⁵² Tordo, Johnston and Johnston (note 144) at 12.

²⁵³ Tordo, Johnston and Johnston (note 144) at 14.

²⁵⁴ Tordo, Johnston and Johnston (note 144) at 14.

²⁵⁵ Tordo, Johnston and Johnston (note 144) at 14.

²⁵⁶ Tordo, Johnston and Johnston (note 144) at 12.

highest bidder. Biddable items vary from country to country, for example in some countries everything is negotiable, while in other countries licences are awarded based on the work programs submitted.²⁵⁷

5. Concluding Remarks

States have discretion where to vest ownership and control of their petroleum resources. The first step in determining whether a regulatory framework for petroleum resources is designed in such a way that petroleum resources is exploited for the benefit of the nation as a whole, is to determine who has ownership and control of these resources. It is posited in the following chapters that in developing countries such as South Africa and Namibia, private ownership of petroleum resources is not a viable option, as this would vest the benefit of these resources in a small handful of individuals.

Once the theoretical model for determining ownership of petroleum resources in any given jurisdiction has been identified, the next step is to look at how access to petroleum resources is granted. Access to petroleum resources flows from the ownership of petroleum resources. Two basic questions form the backbone of any regulatory framework of petroleum, namely, (i) where ownership of petroleum is vested and (ii) how access to petroleum resources is granted. These questions are interrelated: the choice of ownership-model influences how access is granted. All other aspects of petroleum regulation flow from this point.

In keeping with the purpose of this thesis to evaluate the ability of legal frameworks for petroleum exploitation in Namibia and South Africa to ensure that the nation derives the benefit from the exploitation of the petroleum resources of these two countries, this chapter described the allocation procedures for rights to petroleum. It is important for a regulatory framework for petroleum resources to ensure that a balance is struck between the interests of the international oil company doing the exploration and production and the interests of the host nation, represented by the host government.

The state's choice on how access to its petroleum resources is authorised and awarded is important in ensuring that the benefit of the resources accrues to the nation. There

²⁵⁷ Tordo, Johnston and Johnston (note 144) at 12.

are different options available to a state to grant access to petroleum resources. What option the state eventually chooses, depends on various factors. Most importantly, each system allocates risk and benefit differently. Under exclusive rights, the greatest risk falls to the petroleum company, but the petroleum company also enjoys the greatest benefit when commercial quantities of petroleum are found. With contractual arrangements, the allocation of risk and benefit is determined under the contractual arrangement between the state and the petroleum company. A sound knowledge of the allocation of risks and the available authorisations for allocating access to petroleum is necessary on the one hand for the state to make the right decision as to how to grant access to petroleum and on the other hand to inform public debate on what types of authorisations are best for the host country.²⁵⁸

This chapter discussed the general approaches to ownership of and control over petroleum and how states exercising control over petroleum resources grant access to these resources to petroleum companies. It focused on how states that assume control over its petroleum resources grant access to these resources to petroleum companies. Various factors important for determining the appropriate framework for granting access to petroleum resources were discussed. To evaluate the South African and Namibian petroleum regimes, it is important to understand the basic aspects of different systems for allocating access to petroleum resources, as well as the factors that play a role in choosing a system. The instruments used in South Africa and Namibia are discussed next.

²⁵⁸ Radon (note 133) at 61.

PART B:

LAW AND PRACTICE: REGULATION OF UPSTREAM PETROLEUM IN SOUTH AFRICA AND NAMIBIA

Hitherto the attempt has been to explain the possible ownership and control models for petroleum resources,¹ and how access to petroleum resources are created in various jurisdictions,² in creating a point of departure for the discussion that follows. It is now necessary to discuss the ownership and control of unsevered³ petroleum in South Africa and Namibia and how access to petroleum resources is granted. This part of the thesis deals with the regulation of petroleum resources in South Africa and Namibia and the role of the state in the regulation of petroleum in these two countries. It also discusses, in Chapter Nine, how the role of the state as regulator of petroleum resources is limited. The limitation of state control over petroleum resources is vital in ensuring transparency and accountability in the petroleum industry.

South Africa and Namibia both may have viable quantities of petroleum resources. The petroleum industries of both countries, however, are in their infancy. Now is an opportune time to consider whether the regulatory frameworks for petroleum resources in these two countries can appropriately deal with possible growth in their petroleum industries.

The first step in determining and evaluating the regulatory framework for petroleum extraction is to determine the ownership and control models in respect of petroleum resources in South Africa and Namibia. Such models form the basis of the regulatory framework for petroleum resources. Another crucial aspect, discussed in what follows below, is the type of authorisation used by the state to grant access to petroleum resources. Using the identified ownership and control models as points of departure, the

¹ Chapter Three above.

² Discussed in Chapter Four.

³ This thesis is, in general, only concerned with petroleum that has not yet been severed from the land.

rest of this thesis evaluates the different regulatory measures flowing from the model of ownership of and control over petroleum resources.

This part also focuses on the how the legislative framework for petroleum resources ensures that some benefit is derived from the exploitation of these resources by the people of South Africa and Namibia. Because of the framework for granting access to petroleum prevailing in South Africa and Namibia – granting of rights and licences – the state carries very little risk with regard to petroleum exploitation, but, as agent of its people who ultimately own the resource, also receives very little benefit if petroleum is found.⁴ It is therefore important that other measures be put in place to ensure that some benefit of the petroleum resources, if found, flows back into the country. In Namibia and South Africa, there are primarily two ways of ensuring that the people of these two countries benefit from its petroleum industry; first, the state levies royalty and taxes on the petroleum company in respect of its petroleum operations; and second, various socio-economic empowerment measures are put in place.

This part concludes with a discussion of how the state's authority to exercise control over petroleum resources is limited. Here, the principle of just administrative action and the control over corruption is discussed. The focus is on how this links in with the petroleum industry and how it promotes accountability and transparency within the regulatory framework for petroleum resources. .

⁴ See Chapter Four and Chapter Seven above.

Chapter Four:

CURRENT CONSTITUTIONAL AND LEGISLATIVE FRAMEWORKS FOR REGULATING OWNERSHIP OF AND CONTROL OVER PETROLEUM RESOURCES IN SOUTH AFRICA AND NAMIBIA

1. Introduction

This chapter builds upon the groundwork of the previous two chapters by contextualising the general principles and rules discussed there for South African and Namibia respectively. Henceforth for the remainder of the thesis, the discussion is focused on South African and Namibian petroleum law.¹

The main purpose of a legislative framework in respect of petroleum “...is to provide the basic context for and the rules governing petroleum operations in the host country; to regulate them, as they are carried out by both domestic, foreign and international enterprises; and to define the principal administrative, economic and fiscal guidelines for investment activity in the sector.”² The primary purpose of this chapter is to determine the regulatory framework for the ownership of, control over and access to petroleum resources in South Africa and Namibia. The other aspects – environmental, fiscal and socio-economic empowerment – are covered in Chapters Six, Seven and Eight below.

¹ Most of the discussion regarding the Mineral and Petroleum Resources Development Act 28 of 2002 and the ownership of mineral and petroleum resources have focused on minerals only. However, the same discussions may be applied to petroleum resources as well.

² Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 3.

The secondary purpose of this Chapter is to place the regulatory framework for petroleum within the South African and Namibian legal systems. The paragraphs below therefore set out the position as regards ownership of, control over and access to petroleum resources in the two countries. This exposition informs the further discussion of the function of the South African and Namibian states in respect of these resources. This is achieved by determining the exact role that the state plays in regulating access to petroleum resources by looking at the powers granted to the state and the limitations imposed on the state in respect of petroleum resources.

The discussion of the different models of ownership of petroleum above, and the basic rules applicable³ highlighted the two main conceptual extremes, namely that of private ownership and state ownership. The general trend across the globe (with the most prominent exceptions being the United States of America and Canada) is that ownership of petroleum vests in the state.⁴ Namibia follows this trend and vests ownership and control of petroleum resources in the state. South Africa follows a different approach and vests ownership of petroleum resources in the nation as a whole, with the state as custodian controlling these resources on behalf of the people.⁵ The different approaches of the two countries, whose legal systems are otherwise largely similar,⁶ is better understood by an understanding of the history of the regulation of minerals in South Africa and Namibia, provided in Chapter One above. The reason why knowledge of the historic regulation of *minerals* is necessary, is that for the most part, petroleum was not treated separately but as resorting under mineral resources. As such, petroleum has historically escaped dedicated legislative attention in South Africa and Namibia.

Despite the apparent difference between South Africa and Namibia with regard to where ownership of petroleum resources vests, both countries recognise the need to ensure that the exploitation of the countries' petroleum resources are for the benefit of the nation as a whole. Whether this is actually achieved will depend on the regulatory

³ See Chapter Three above.

⁴ Taverne B *An Introduction to the Regulation of the Petroleum Industry: Laws, Contracts and Conventions* International Energy and Resources Law and Policy Series (1994) London Graham & Trotman Limited at 11.

⁵ Section 3(1) of the MPRD Act.

⁶ See Chapter One above.

framework for petroleum resource exploitation, determined primarily by the specific legislation dealing with petroleum, .

In view of the above, this chapter discusses the current constitutional and legislative framework for the regulation of petroleum resources in South Africa and Namibia in general. The remainder of the thesis looks at specific aspects of the framework for petroleum resources in these two countries and how the elements of transparency, accountability and balance of interests feature in this framework.

2. Current Policies and Regulatory Frameworks

Namibia vests ownership of and control over all natural resources (including petroleum) in the state.⁷ In South Africa, the line between private and state ownership of petroleum resources is blurred. The legislature opted for a model of custodianship over petroleum resources, rather than vesting ownership of petroleum resources in the state. The state, however, is vested with control over petroleum resources. Nevertheless, the right to exploit petroleum has predominantly been reserved for the state since the middle of the twentieth century.⁸ Under the new regulatory framework, however, petroleum resources also fall under the custodianship of the state. The effect to which that has influenced or changed the state's control over these resources is discussed in more detail below.

It is important for any company wishing to invest in a country's petroleum resources to have a clear understanding of the basic framework governing petroleum resources.⁹ For this reason, it is important for the regulatory framework for petroleum resources to be clear and transparent. Every basic petroleum law should deal with certain key issues. These include the role of the government and the national petroleum company, types of rights to petroleum and how these rights are granted, the different stages of

⁷ Article 100 of the Constitution of the Republic of Namibia, 1990; section 2 of the Petroleum (Exploration and Production) Act 2 of 1991.

⁸ See Chapter One above.

⁹ Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.27.

exploitation, environmental requirements, financial aspects, dispute resolution, the role of national courts and fines and penalties.¹⁰

By way of outlining the regulatory frameworks for petroleum resources in South Africa and Namibia for the discussion below, the following may be noted: First, regulation of the upstream petroleum industry, in particular access to the resource, is discussed in Chapter Five below. In South Africa petroleum exploitation is primarily regulated by the Mineral and Petroleum Resource Development Act¹¹ (“**MPRD Act**”). In Namibia, the Petroleum (Exploration and Production) Act¹² (“**Petroleum Act**”) deals primarily with the exploitation of upstream petroleum resources. Second, additional environmental obligations are prescribed in a further layer of legislation, discussed in Chapter Six below: the South African National Environmental Management Act¹³ and the Namibian Environmental Management Act¹⁴ attach further obligations to a private company’s access to petroleum resources to ensure that the resource is exploited for the benefit of the nation as a whole in the light of the right to a clean environment. Third, imposition of royalty form part of the regulatory framework. In Namibia, the Petroleum Act deals with this aspect too, while in South Africa the Minerals and Petroleum Royalty Act¹⁵ is the applicable statute. This is discussed in Chapter Seven. Fourth, the petroleum industry operates within a wider framework for socio-economic empowerment, discussed in Chapter Eight. Finally, the state’s role as regulator of the industry and the resource, its powers and discretions are discussed below in Chapter Nine, with reference to the right to fair and reasonable administrative action, the right to information and the prohibition of corrupt practices in respect of petroleum resources.

It is necessary first, however, to obtain clarity on exactly how petroleum resources in South Africa are controlled and administered. To answer this, the framework for petroleum resources and the implications thereof on ownership of and control over petroleum resources need to be discussed.

¹⁰ Alramahi (note 9) at §1.46. See also Chapters Five, Six and Seven below.

¹¹ Mineral and Petroleum Resources Development Act 28 of 2002.

¹² Petroleum Act.

¹³ National Environmental Management Act 107 of 1998.

¹⁴ Environmental Management Act 7 of 2007.

¹⁵ Mineral and Petroleum Resources Royalty Act 28 of 2008.

2.1 The Constitutional Framework

Upon gaining independence in 1990, Namibia immediately adopted a new Constitution, namely the Constitution of the Republic of Namibia, 1990 (“**Namibian Constitution**”). South Africa shortly followed suit and, after its first democratic election in 1994, adopted first an interim Constitution, the Constitution of the Republic of South Africa 200 of 1993, and then a final Constitution, the Constitution of the Republic of South Africa, 1996 (“**South African Constitution**”). The South African Constitution and Namibian Constitution overlap in material aspects, but also differ in other important aspects.

Both countries’ Constitutions recognise the injustices of the past as a result of colonialism, racism and apartheid and the resultant need for an open and democratic society under the leadership of a government freely elected by the people.¹⁶ The Constitutions of these two countries therefore establish the countries as sovereign and democratic states based on the supremacy of the Constitution and the Rule of Law.¹⁷ By designating the Constitution as the supreme law of these two countries, all laws of these countries and conduct of its people, including that of the Executive, Judiciary and Legislative, must be consistent with the Constitution and the obligations imposed by the Constitutions must be fulfilled.¹⁸

2.1.1 Treatment of Natural Resources

One of the most important differences for purposes of this thesis is that the Namibian Constitution vests all natural resources in the state, unless they are otherwise lawfully owned.¹⁹ The South African Constitution does not even have a remotely similar vesting clause, but deals with natural resources in a different manner. It recognises, for example, the right of every person to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that *inter alia* secure ecologically sustainable development and use of natural resources

¹⁶ See the Preamble to the South African Constitution and the Namibian Constitution.

¹⁷ Article 1 of the Namibian Constitution and section 1 of the South African Constitution.

¹⁸ This is expressly stated in the South African Constitution in section 2 and implied in the Namibian Constitution by virtue of article 1(6).

¹⁹ Article 100 of the Namibian Constitution.

while promoting justifiable economic and social development.²⁰ Furthermore, in its clause dealing with property,²¹ it states that property may be expropriated only in terms of a law of general application for a public purpose of in the public interest and subject to payment of compensation.²² The South African Constitution, in the property clause, expressly states that “public interest includes ... reforms to bring about equitable access to all South Africa's natural resources.”²³

There thus appears to be a stark difference in the emphasis that the two Constitutions place on control over natural resources. While the Namibian Constitution seems to vest natural resources entirely under state control (which makes sense in the light of the history of the treatment of natural resources in Namibia, discussed above in Chapter One), the South African Constitution has a more nuanced and socially sensitive approach to natural resource management. However, although the vesting clause in the Namibian Constitution has often been read to mean that the state owns all natural resources, the High Court of Namibia recently dismissed such a reading.²⁴ The Court held that this vesting clause should be read subject to the other provisions of the Namibian Constitution, most notably the article that states that “[a]ll power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.”²⁵ The Court stated that, in its view, the state’s resource ownership should not be equated with the rights of a private owner. Instead, natural resources should be seen as belonging to the people either as *res publica* or *res omnium communes*.²⁶ In concluding this part of its decision, the Court stated that natural

²⁰ Section 24 (b)(iii) of the South African Constitution.

²¹ Section 25 of the South African Constitution. Section 25(1) states that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

²² Section 25(2) of the South African Constitution.

²³ Section 25(4)(a) of the South African Constitution.

²⁴ *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC) at [8].

²⁵ Article 1(2) of the Namibian Constitution. See *Rostock CC and Another v Van Biljon* 2011 (2) 751 (HC) at [9].

²⁶ The Court argued here that “belonging” does not mean the same as “owning”, referring to Gaius *Digesta* 1.8.1.pr: “*nullius in bonis esse creduntur*. These things belonged to no one in ownership (*nullius in bonis esse creduntur*), but were those of the whole world (*ipsius enim universitatis esse creduntur*). In the discussion of the things belonging to the whole world no reference was made to the concept ownership. This could have created the indication that these goods were *res omnium communes*. It was therefore not the property of a person or common property of all persons. It was, at the most, available for common use (*universitates*).” See *Rostock* (note 24) at [10] – [11]. Van den Berg HM *Mineral Rights under Development: A Comparative Study of the Evolving*

resources are simply administered by the state (through its incumbent elected government)²⁷ on behalf of the Namibian people.²⁸ Therefore, even under the Namibian Constitution, it may be argued that natural resources should be managed in a socially responsive manner.²⁹

The first important aspect of the constitutional frameworks of Namibia and South Africa in respect of petroleum is that these resources should be managed so as to give effect to the interests of the people of these two countries. All legislation should adhere to this obligation. By imposing this obligation on states, acting through elected governments, the South African and Namibian Constitutions recognise the interests of the people in respect of petroleum and holds governments accountable on a constitutional level to its people in managing these resources.

2.1.2 Entrenchment of Fundamental Rights

Both Constitutions contain a Bill of Rights, setting out the fundamental human rights and freedoms.³⁰ So, for example, the Constitutions recognise the right to life,³¹ human dignity,³² equality and freedom from discrimination³³ and property.³⁴ The Constitutions also recognise certain freedoms, including the freedom to practice any trade or profession.³⁵ One important aspect in which the South African Constitution differs from the Namibian Constitution is its treatment of the environment, discussed below. Both Constitutions, however, recognise the fundamental right to just

Nature of Mineral Rights in South Africa and Namibia (unpublished LLM-thesis, University of Cape Town, 2009) at 93 argues that unsevered mineral resources in Namibia must be seen as *res publica*. See also Mostert H and Van den Berg HM “Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences” in Zillman DN, McHarg A, Bradbrook A and Barrera-Hernandez L (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) Oxford University Press at 84.

²⁷ This part was not added by the Court, but probably should have been. The State may be defined as a legal person consisting of a community of people that live on a particular area of land under a specified authority according to common legal rules. The Government consists of the people and bodies exercising authority on behalf of the State. See Wiechers M *Verloren van Themaat Staatsreg* 2ed (1967) Durban Butterworths at 5 – 6.

²⁸ *Rostock* (note 24) at [10].

²⁹ See further paragraphs 2.2. and 2.3. below.

³⁰ Chapter 3 of the Namibian Constitution and Chapter 2 of the South African Constitution.

³¹ Article 6 of the Namibian Constitution and section 11 of the South African Constitution.

³² Article 8 of the Namibian Constitution and section 10 of the South African Constitution.

³³ Article 10 of the Namibian Constitution and section 9 of the South African Constitution.

³⁴ Article 16 of the Namibian Constitution and section 25 of the South African Constitution.

³⁵ Article 21(1)(j) of the Namibian Constitution and section 22 of the South African Constitution.

administrative action, which is an important right in respect of the regulation of petroleum and discussed in more detail later in Chapter Nine.

The rights and freedoms contained in the Bill of Rights must be respected and upheld by all branches of government and, where applicable, all natural and legal persons, and are enforceable in a court of law.³⁶ The rights and freedoms in the Bill of Rights of both Constitutions may only be limited under certain circumstances. Under the South African Constitution, the rights in the Bill of Rights may only be limited in terms of a law of general application and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁷ The limitation clause in the Namibian Constitution is more stringent and states that the rights or freedoms in the Namibian Bill of Rights may only be limited by a law of general application and that the limitation may not negate the essential content thereof and may not be aimed at a particular individual.³⁸

The second important aspect of the constitutional frameworks of Namibia and South Africa in respect of petroleum is that any legislation passed in relation to petroleum resources must respect and uphold the fundamental rights and freedoms of the people as set out in the Bill of Rights. If a piece of legislation infringes any of these rights of freedoms, it must meet the constitutional requirements of limitations of rights and freedoms. By subjecting legislation in respect of petroleum resources to the fundamental rights and freedoms set out in the respective Bills of Rights, the interests of people (both those applying for and holding rights to petroleum and those affected by petroleum exploitation) are further defined. Furthermore, by making these rights and freedoms justiciable, emphasis is placed on the accountability of governments towards its people.

³⁶ Article 5 and article 25 of the Namibian Constitution and section 8 of the South African Constitution.

³⁷ Section 36(1) of the South African Constitution. When limiting a right, all relevant factors must be taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose.

³⁸ Article 22(a) of the Namibian Constitution.

2.1.3 Sustainable Development, Environmental Protection and the Constitution

The right to a clean environment is contained in local legislation and regional, African and international documents.³⁹ Domestic and international environmental law is underpinned by the notion of sustainable development, which may be understood as development that meets the need of the present without jeopardising the ability of future generations to meet their needs.⁴⁰ This definition integrates three features into decision-making, namely environmental protection, economic development and social upliftment.⁴¹

Sustainable development is expressly referred to in the South African Constitution and the Namibian Constitution.⁴² The concept of “sustainable development” is “a fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa...”⁴³ Both Constitutions deal with environmental protection and recognise the need to ensure sustainable development. Different emphases are, however, placed on the environment. In South Africa, for example, the environmental right is included in its Bill of Rights and have characteristics of all three generations of rights.⁴⁴ The Namibian Constitution, on the other hand, deals with the environment in its chapter on the principles of state policy.⁴⁵ The principles cannot be regarded as constitutional rights *strictu sensu*, but rather societal goals.⁴⁶

³⁹ See Chapter Six below.

⁴⁰ See Glazewski J *Environmental law in South Africa* 2 ed (2005) Durban LexisNexis Butterworths at 12–13.

⁴¹ See also Glazewski (note 19) at 13.

⁴² Section 24 of the South African Constitution and article 95(1)(l) of the Namibian Constitution.

⁴³ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 144.

⁴⁴ Kidd M *Environmental Law* 2 ed (2011) Claremont Juta & Co Ltd at 21 22; Glazewski J "The Environmental Right" in Cheadle D, Davis DM and Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (Service Issue 11 2011) Durban LexisNexis at 19-11.

⁴⁵ Article 95 of the Constitution of the Republic of Namibia, 1990.

⁴⁶ Naldi G *Constitutional Rights in Namibia* (1995) Kenwyn Juta at 99.

The importance of sustainable development was highlighted in the last few years in South Africa when acid mine drainage came under the spotlight.⁴⁷ In short, acid mine drainage is when decant from defunct mines drains into surrounding water resources.⁴⁸ The relationship between the extraction of natural resources and the long-lasting effect thereof on the environment in the long run came under discussion.⁴⁹ It also featured prominently recently when Shell proposed to employ hydraulic fracturing in the environmentally-sensitive Karoo-Basin.⁵⁰

The South African Constitution places much greater emphasis on the environment than its Namibian counterpart by guaranteeing, in its Bill of Rights, every person's right to an environment that is not harmful to their health or well-being.⁵¹ Furthermore, every person has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation,⁵² promote conservancy⁵³ and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁵⁴

Because environmental rights are included in the Bill of Rights, these rights feature prominently in South Africa and are entrenched, justiciable rights.⁵⁵ By implication, environmental considerations are afforded appropriate respect and recognition in the administrative processes of South Africa.⁵⁶ This is especially important in the light of the fact that petroleum exploitation is regulated by administrative processes.⁵⁷

⁴⁷ See for example Sader G "Acid Mine Drainage: The Neighbour Law Implications" (unpublished LLB-thesis, University of Cape Town, 2011), available at <http://landlawwatch.co.za/projects-mpl.html> [accessed 12.04.2015].

⁴⁸ Van Vuuren L "SA Urged to Say "NO" to Instant Wealth and "YES" to Environment" Nov/Dec 2009 *The Water Wheel* 21 at 21.

⁴⁹ Van Vuuren (note 24) at 21; McCarthy T "The Impact of Acid Mine Drainage in South Africa" 2011 (107) *South African Journal of Science* 1.

⁵⁰ See Chapter Six below.

⁵¹ Section 24(a) of the South African Constitution.

⁵² Section 24(b)(i) of the South African Constitution.

⁵³ Section 24(b)(ii) of the South African Constitution.

⁵⁴ Section 24(b)(iii) of the South African Constitution.

⁵⁵ *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719; *BP / MEC* (note 43) at 142.

⁵⁶ *Director: Mineral Development / Save the Vaal* (note 40) at 719.

⁵⁷ See Chapter Seven above.

The constitutional environmental right echoes the concept of “sustainable development” and has been quoted with approval by South African courts.⁵⁸ Petroleum exploitation can no longer only be guided by pure economic principles.⁵⁹ Any development, including development in the petroleum industry, must meet present needs without compromising the ability of future generations to meet their own needs.⁶⁰ The potential profitability of a petroleum exploitation project cannot overshadow the impact that it may have on the environment.⁶¹

While the Namibian Constitution does not place the same amount of emphasis on the environment than its South African counterpart, it was the southern African forerunner in including a provision dealing with the environment in its Constitution.⁶² The Namibian Constitution does not entrench the right to the environment in its Bill of Rights, but lists it under the principles of state policy.⁶³ The Constitution states that the state must actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians.⁶⁴

The principles of state policy are not by themselves legally enforceable by any court, but serve as a guide to government in making and applying laws to give effect to the fundamental objectives contained in the principles. The courts are, however, entitled to consider the principles in interpreting any laws based on them.⁶⁵ As a result, Namibia does explicitly recognise environmental rights as human rights.⁶⁶ Under international law, however, the citizens of Namibia have a right to a clean environment. This is

⁵⁸ See *BP / MEC* (note 43) at 144; *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) at 518.

⁵⁹ See also *BP / MEC* (note 43) at 144.

⁶⁰ *HTF Developers* (note 43) at 518.

⁶¹ *BP / MEC* (note 43) at 144.

⁶² Glazewski (note 20) at 71.

⁶³ Article 95 of the Namibian Constitution.

⁶⁴ Article 95(1)(l) of the Namibian Constitution.

⁶⁵ Article 101 of the Namibian Constitution.

⁶⁶ See also for example Ruppel O "Human Rights and the Environment" in Ruppel OC and Ruppel-Schlichting K (eds) *Environmental Law and Policy in Namibia* (2011) Windhoek OrumbondePress.na & Welwitschia Verlag Dr. A. Eckl, Essen at 219-220.

supported by the fact that the Namibian legislature has put various provisions in place through which the right to a clean environment may be enforced.⁶⁷

2.2 Aims and Objectives of the Legislative Framework for the Regulation of Petroleum Resources

The balance of interests between the nation and petroleum companies is clearly described in the preamble⁶⁸ and objects⁶⁹ of the MPRD Act, which mirror and amplify each other. The objectives of the MPRD Act are couched in broad terms and give the MPRD Act a socio-economic dimension, as well as an international dimension. The objectives of the MPRD Act⁷⁰ can be grouped into three main categories, namely those relating to the state's interests, those relating to the interest of the people of South Africa, and those relating to the interests of (foreign and local) investors in the industry.

Objectives expounding the state's interest include the first stated point in the MPRD

⁶⁷ See Chapter Six below.

⁶⁸ The Preamble reads as follows:

“RECOGNISING that minerals and petroleum are non-renewable natural resources;
ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;
AFFIRMING the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development;
RECOGNISING the need to promote local and rural development and the social upliftment of communities affected by mining;
REAFFIRMING the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources;
BEING COMMITTED to eradicating all forms of discriminatory practices in the mineral and petroleum industries;
CONSIDERING the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination;
REAFFIRMING the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations; and
EMPHASISING the need to create an internationally competitive and efficient administrative and regulatory regime...”

The fourth statement and the eighth statement in the Preamble only refer to the minerals industry. The fourth statement recognises the need to promote local and rural development and the social upliftment of communities affected by mining, while the eighth statement reaffirms the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations. The effect of this on the petroleum industry is discussed elsewhere. Suffice it to say that in the light of the general tenor of the MPRDA and the objects explicitly stated, the fourth statement and the eighth statement in the Preamble should be read as applying to both minerals and petroleum.

⁶⁹ Dealt with in detail in section 2 of the MPRD Act.

⁷⁰ The objects are the same for mineral resources. Since this thesis only focuses on petroleum resources, the discussion will be limited to the application of the MPRD Act in respect of petroleum resources.

Act's preamble, i.e. to recognise the internationally accepted right of the State to exercise sovereignty over all the petroleum resources within the Republic of South Africa.⁷¹ This is in line with international law as discussed in Chapter Three above. The second objective which also resorts in this category, is to give effect to the principle of the State's custodianship of the nation's petroleum resources.⁷² This is achieved in section 3(1), which vests mineral and petroleum resources in the custodianship of the state. The eighth objective of the MPRD Act recognises the effect of mineral and petroleum exploitation on the environment. This objective is aimed at giving effect to section 24 of the South African Constitution by ensuring that the nation's petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.⁷³ This objective is discussed in more detail in chapter 9 below.

In the category of giving effect to the rights of the people of South Africa belongs the MPRDA's third objective: to promote equitable access to the nation's petroleum resources to all the people of South Africa.⁷⁴ The fourth objective supplements further: to expand, in a substantial and meaningful manner, opportunities for historically disadvantaged persons – which includes women – to enter the petroleum industries and to benefit from the exploitation of the nation's petroleum resources.⁷⁵ Also in line with the other objectives of socio-economic empowerment is the sixth objective, namely to promote employment and advance the social and economic welfare of all South Africans,⁷⁶ and the ninth objective, namely to ensure that holders of production rights contribute towards the socio-economic development of the areas in which they are operating.⁷⁷ These objectives are discussed in more detail in Chapter Eight below. Finally, the fifth objective also belongs here: to promote economic growth and the development of petroleum resources in South Africa.⁷⁸ The second (custodianship) and eighth (environmental protection) objectives, mentioned under “state interests” above

⁷¹ Section 2(a) of the MPRD Act.

⁷² Section 2(b) of the MPRD Act.

⁷³ Section 2(h) of the MPRD Act.

⁷⁴ Section 2(c) of the MPRD Act.

⁷⁵ Section 2(d) of the MPRD Act.

⁷⁶ Section 2(f) of the MPRD Act.

⁷⁷ Section 2(i) of the MPRD Act.

⁷⁸ Section 2(e) of the MPRD Act.

also resort here, as the interest of the people in the endorsement of these objectives are also undeniable.

In the category dealing with the interests of investors belong the MPRDA's seventh objective, of providing for security of tenure in respect of exploration and production operations.⁷⁹ Security of tenure deals with the nature and content of rights to petroleum. It is important for an investor to know what type of right it obtains, what it can do with this right, how the state can cancel or suspend the right and how the right may be renewed or transferred or how an interest in the right may be granted. This is discussed in more detail in Chapter Five below.

The Petroleum Act of Namibia does not contain any social obligations on the state similar to those of the MPRD Act. In fact, the Petroleum Act does not explicitly state any objectives. On a first reading, it does not appear as if the state has a duty to ensure the optimal exploitation of petroleum resources for the benefit of the people of Namibia. The purposes of the Petroleum Act can be deduced from the substantive provisions of the Act and judicial opinion, though. The High Court of Namibia for instance has recognised that the state, through its elected government, must administer natural resources on behalf of the people of Namibia.⁸⁰ Furthermore, there are various other indicators throughout the Act and in other documents related thereto that the state is under an obligation to ensure that petroleum resources are exploited for the benefit of all the people. For example, the Petroleum Act sets out standard terms and conditions relating to preferential employment, skills development and procurement.⁸¹ The Petroleum Act, unlike its South African counterpart, does not expressly refer to the promotion of security of tenure. This is discussed in more detail in Chapter Five below.

⁷⁹ Section 2(g) of the MPRD Act.

⁸⁰ See earlier with reference to *Rostock* (note 24).

⁸¹ It is a standard term and condition of any petroleum licence that the holder thereof must, in the employment of employees, give preference to Namibian citizens who possess appropriate qualifications for the purpose of the operations to be carried out in terms of the licence. Section 14(a) of the Petroleum Act. Furthermore, holders must carry out training programmes to encourage and promote the development of such citizens in such person's employ. Section 14(b) of the Petroleum Act. A holder of a licence must also, after due regard being had to the need to ensure technical and economic efficiency, make use of products, equipment and services which are available in Namibia. Section 14(c) of the Petroleum Act. Holders must co-operate with other persons involved in the petroleum industry to enable such citizens to develop skills and technology to render services in the interest of such industry in Namibia. Section 14(d) of the Petroleum Act.

Before a petroleum licence is issued in Namibia, the Minister must enter into a petroleum agreement with the persons concerned. The agreement may not be in conflict with the provisions of the Petroleum Act.⁸² This agreement must set out the terms and conditions, apart from the standard terms and conditions contained in the Act, subject to which the licence will be issued.⁸³ Importantly, however, is that the agreement must not be interpreted in such a way that a party to the agreement is absolved from any requirement laid down by law, nor does it absolve a holder from applying for, and obtaining, any permit, licence, approval, permission or other document required by law, such as an ECC.⁸⁴

Aside from the above, the Namibian Ministry of Mines and Energy also published a White Paper on Energy in 1998.⁸⁵ This White Paper addresses both the upstream and the downstream energy sectors in Namibia. With regard to the upstream sector, it states that the primary challenge for upstream petroleum policy is identifying and developing petroleum resources for the benefit of Namibia as a whole.⁸⁶ To achieve this, the Namibian upstream policy should aim to attract adequate investment in exploration and production, especially in the light of the limited capacity of the local petroleum exploration and production sector.⁸⁷

Despite the fact that the Petroleum Act does not contain any explicit indication of its objectives, a proper reading of the Act shows that there are various provisions that oblige the state to ensure that the nation benefits from petroleum resources. This is further amplified by the provisions of the White Paper on Energy and the interpretation of the High Court. It is clear, however, that on the one hand, petroleum must be developed and exploited for the benefit of the Namibian people, but on the other hand, investors must be attracted and sufficiently protected.

⁸² Any provisions inconsistent with the Act are deemed to be of no force and effect. Section 13(1) and section 13(4) of the Petroleum Act.

⁸³ Section 13(1) of the Petroleum Act.

⁸⁴ Section 13(5) of the Petroleum Act.

⁸⁵ Available at http://www.mme.gov.na/pdf/energy_policy_whitepaper.pdf [accessed 10 July 2013].

⁸⁶ Paragraph 3.2.1. of the White Paper on Energy.

⁸⁷ Paragraph 3.2.1. of the White Paper on Energy.

2.3 Ownership of Petroleum Resources

According to Onorato, the first essential element of any petroleum law is an assertion of state ownership over petroleum resources within its boundaries. This is consistent with international standards and established practice.⁸⁸

The South African state, as custodian,⁸⁹ exercises control over petroleum resources for the benefit of the nation as a whole.⁹⁰ This is enabled by the MPRD Act, which deals with the exploration and production of petroleum in South Africa. This Act is applicable to all resources which fall under the definition of mineral and petroleum.⁹¹ It is regulated by the Department of Mineral Resources through the Minister of Mineral Resources.⁹² Its principle aim is to provide for equitable access to and sustainable development of South Africa's mineral and petroleum resources and for matters incidental thereto.⁹³

The choice of a custodianship model obscures the line between state ownership and private ownership of petroleum resources, discussed in Chapter Three above. The MPRD Act introduces a new form of control over petroleum resources, namely custodianship, and vests petroleum resources in the nation as a whole. In doing so, the legislature introduced “uniquely South African tools to regulate public resources”.⁹⁴

⁸⁸ Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 5.

⁸⁹ Under the MPRD Act, petroleum resources vest in the nation and the state is custodian thereof for the benefit of the nation. Section 3(1) of the MPRD Act.

⁹⁰ Section 3(1) of the MPRD Act.

⁹¹ See Chapter Five, paragraph 2 below for a discussion of the definition of petroleum.

⁹² In May 2009, the national cabinet was reorganised. As a result, the Department of Minerals and Energy was divided into two separate departments, the Department of Minerals Resources and the Department of Energy. Each department has its own cabinet minister. The two new ministers are the Minister of Mineral Resources and the Minister of Energy. A proclamation was made on 22 June 2009 which transfers the administration, powers and functions of specific legislation to the new ministers. This Proclamation was published as Proclamation 44, 1 July 2009 *Government Gazette* 32367. With effect from 1 July 2009, the Mineral and Petroleum Resources Development Act 28 of 2002 is administered by the Minister of Minerals Resources. See item 1.9 of the Schedule to Proclamation 44, 1 July 2009 *Government Gazette* 32367. Therefore, while the MPRD Act still defines Minister as the Minister of Minerals and Energy in section 1, it is now administered by the Minister of Mineral Resources.

⁹³ Long title of the MPRD Act.

⁹⁴ Watson D “Ownership of and custodian over unsevered minerals: the impact of the MPRDA” (Unpublished LLB thesis, University of Cape Town, 2009) at 24, available at www.landlawwatch.co.za [accessed 02.02.2014].

The choice elicited various academic responses as to what exactly custodianship entails.

Different theories of the state's custodianship have been proposed. Most discussions, however, are limited to mineral resources.⁹⁵ Because mineral and petroleum resources are both dealt with in the MPRD Act, the same arguments can be applied to petroleum resources. Some scholars argue that the MPRD Act abolished the *cuius est solum* principle and that ownership of unsevered minerals and petroleum falls to the state.⁹⁶ This view is contested by other scholars, who propose a second theory and state that what is actually intended by the MPRD Act is that the collective wealth of the mineral and petroleum resources in South Africa vest in the nation, but that unsevered minerals and petroleum remain vested in the owner of the land.⁹⁷ In terms hereof, the *cuius est solum* rule has not been abrogated and the landowner remains owner of the minerals and petroleum found in or on the land.

A third theory states that the MPRD Act introduced the concept of public trust and that the mineral and petroleum resources are now held in public trust by the state for the benefit of the nation.⁹⁸ The applicability of the public trust concept, which is prevalent in the United States, and its possible application in South Africa is questionable.⁹⁹ The role that the public trust doctrine fulfils is already fulfilled in South Africa by the

⁹⁵ See for example Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 13-4 – 13-11; Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G and Loxton C *South African Mineral and Petroleum Law* (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at 121; Van den Berg HM "Ownership of Minerals under the New Legislative Framework for Mineral Resources" 2009 (20) *Stellenbosch Law Review* 137; Watson (note 94); Van der Schyff E "Who 'Owns' the Country's Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act" 2008 (4) *TSAR* 757; Badenhorst PJ "Ownership of Minerals *in situ* in South Africa: Australian Darning to the Rescue" 2010 *SALJ* 646.

⁹⁶ Badenhorst PJ "Exodus of 'Mineral Rights' from South African Mineral Law" 2004 (22) *Journal of Energy and Natural Resources Law* 218 at 223; Badenhorst and Mostert (note 95) at 13-5; Badenhorst PJ and Mostert H "Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act 28 van 2002: 'n Herbeskouing" 2007 *TSAR* 469 at 476. See also Badenhorst (note 95) at 655–656.

⁹⁷ Dale et (note 95) at 121. See also Watson (note 94) at 13 - 16; Badenhorst (note 95) at 656 - 658.

⁹⁸ Glazewski J *Environmental law in South Africa* 2 ed (2005) Durban LexisNexis Butterworths at 468; Van der Schyff (note 95) at 765; Watson (note 94) at 23 - 27; Van der Schyff E, "Die Nasionalisering van Minerale Hulpbronne" Lente / Spring 2010 *Woord en Daad / Word and Action* 20 at 20; Badenhorst (note 95) at 658–660.

⁹⁹ Van den Berg (note 95) at 148.

concept of *res publica*.¹⁰⁰ A final theory is that the collective mineral and petroleum resources should be considered a *res publica* and that the state controls these resources for the benefit of the nation.¹⁰¹

Despite the abundance of academic discussion regarding custodianship and its meaning, the courts in South Africa have not pronounced themselves clearly on what custodianship means. In an unreported decision of the High Court of Orange Free State, the court merely stated that the “fundamental change” to custodianship means that “the State has done away with the legal notion of private ownership of mining and mineral rights and the State in granting prospecting benefits or permits is not dealing with the mineral resources of the public as a holder of common-law rights nor does it deal with these minerals as a subject of mineral rights of private persons.”¹⁰² In another unreported judgment, the same division of the High Court bluntly stated that custodianship does not mean that minerals are *res publica*.¹⁰³ The reasons given by the Court are somewhat weak. The Court states that it is not *res publica* as nowhere in the MPRD Act does it state that mineral resources belong to the state. The Court compares it to fishing resources, which also fall under the custodianship of the state, but states that this does not mean that the state owns fishing resources – “[t]he fishing resources comprise, simply, the wealth of fish which South Africa can call upon if need be. The MPRDA controls the use of the “resource”.”¹⁰⁴

In the important case of *Agri SA v Minister for Minerals and Energy*,¹⁰⁵ the Constitutional Court refrained from analysing the concept of state custodianship of

¹⁰⁰ Van den Berg (note 95) at 155.

¹⁰¹ Badenhorst and Mostert (note 95) at 13-5; Badenhorst and Mostert (note 9) at 476–478; Van den Berg (note 95) at 154 –156. See also Watson (note 94) at 19 - 22; Badenhorst (note 95) at 660–661.

¹⁰² *De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region, Department of Minerals and Energy and Others* [2009] JOL 23667 (O) at 30.

¹⁰³ *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* (Orange Free State Provincial Division, unreported judgment delivered on 13 December 2007, case number 3215/06) at [38].

¹⁰⁴ *De Beers / Ataquia* (note 103) at [38]. In Van den Berg (note 95) at 151 – 152, it is stated that “[t]he argument is not, however, that minerals are *res publicae*, but rather that the collective mineral and petroleum resources of the country is a *res publica*... When one applies the *res publica* argument to fishing resources, one might argue that the wealth of fishing resources is in fact a *res publica* and that the state controls it as custodian for the benefit of the nation. This does not mean that the fish belong to the state in private ownership or that it is the fish that are *res publicae*.”

¹⁰⁵ *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

mineral (and by extension petroleum) resources. The court did, however, state that assumption of custodianship and the concomitant power to grant what could previously have been granted only by holders does not mean that the state acquired ownership of rights to mineral and petroleum resources.¹⁰⁶ This is repeated later in the judgment where the court states that it is not necessary to define custodianship and that, whatever custodianship means, “it does not mean that the state has acquired and thus has become owner of the mineral rights concerned.”¹⁰⁷ By assuming custodianship the state is “a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.”¹⁰⁸

Whatever the correct interpretation is, landowners clearly and importantly no longer have a right to exploit the minerals in or under their land; nor can they cause it to be exploited. In fact, the Supreme Court of Appeal in South Africa has held that “there is nothing to be gained by attempts to dissect these concepts and categorise them in terms of private law concepts such as ownership.”¹⁰⁹ On the contrary, Mostert argues that more content needs to be given to the concept of custodianship.¹¹⁰ Without expressing a preference for any of the theories, Mostert notes that both the *res publica* concept and the public trust doctrine pursue a shared idea: “if the state were to be the owner of the country’s mineral resources, the MPRDA would have authorised it to act as owner.”¹¹¹ Instead, the state does not enjoy discretionary use and enjoyment of the resources; the MPRDA “is at pains to limit discretionary exercise of state power”.¹¹²

Clearly the introduction of the MPRD Act and the adoption of the notion of custodianship allows the state now to control all activities in respect of minerals and petroleum, but it has a duty to do so for the benefit of the nation as a whole.¹¹³ By acting as custodian, the state is expected to demonstrate a “higher duty of care and

¹⁰⁶ *Agri SA* (CC) (note 105) at [68].

¹⁰⁷ *Agri SA* (CC) (note 105) at [71].

¹⁰⁸ *Agri SA* (CC) (note 105) at [68].

¹⁰⁹ *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) at [86].

¹¹⁰ Mostert H *Mineral Law: Principles and Policies in Perspective* (2012) Claremont Juta & Co Ltd at 135.

¹¹¹ Mostert (note 110) at 135.

¹¹² Mostert (note 110) at 135.

¹¹³ Badenhorst and Mostert (note 95) at 13-8.

degree of responsibility than what can be expected of an owner”.¹¹⁴ As custodian, the state can grant rights to exploit petroleum resources to suitable applicants. These rights take the form of reconnaissance rights, exploration rights and production rights.¹¹⁵ Exploration rights and production rights are limited real rights in respect of land over which they are granted.¹¹⁶ The state is under an obligation to ensure that, in granting these rights, its duty towards the nation is fulfilled. In other words, the state must, when granting the rights, ensure that the petroleum resources will be exploited to the benefit of the nation as a whole.

Unlike South Africa, Namibia follows the general international trend and vests ownership and control of petroleum resources in the state. As stated above, under the Namibian Constitution, all natural resources vest in the state, unless they are otherwise lawfully owned. The High Court of Namibia has interpreted this to mean that these resources are either *res publica* or *res omnium communes* and that the state (through its elected government) must exercise control over natural resources on behalf of its people. Furthermore, the Petroleum Act states that all rights in respect of petroleum resources are vested in the state as well.¹¹⁷ In Namibia, therefore, the position is clearer: the state controls all petroleum resources and the government must exercise this control on behalf of its people.

2.4 Regulation of Access to Petroleum and the Administration of Petroleum Resources

The second essential element of a petroleum law is an identification of a single government agency or competent authority vested with the mandate to implement government policy in respect of petroleum resources. This should preferably be a government ministry, acting on behalf of the government, but in some instances this may also be a national petroleum company.¹¹⁸

As custodian, the South African State must ensure that petroleum resources are

¹¹⁴ Mostert (note 110) at 135.

¹¹⁵ See section 5(1) of the MPRD Act. See also Chapter Five below.

¹¹⁶ Section 5(1) of the MPRD Act.

¹¹⁷ Section 2 of the Petroleum Act.

¹¹⁸ Onorato (note 2) at 6 – 7.

controlled so that the aim and the objectives of the MPRD Act are met. To do this, the state is authorised to grant, issue, refuse, control, administer and manage any technical co-operation permit, reconnaissance permit, exploration right and production right in respect of petroleum.¹¹⁹ This is discussed in more detail in Chapter Five below. Furthermore, the State may, in consultation with the Minister of Finance, determine and levy any fee or consideration payable under any relevant Act of Parliament in respect of petroleum.¹²⁰ This is discussed in more detail in Chapter Seven below.

The Minister must ensure the sustainable development of South Africa's petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.¹²¹ This is discussed in more detail in Chapters Six and Eight below. By promoting sustainable development, which encompasses the three pillars of economic development, social development and environmental protection,¹²² the MPRD Act aims at ensuring that the benefit from the country's mineral and petroleum resources is spread over the long-term.

The MPRD Act provides for a three-tier administration, namely the Minister of Mineral Resources, the Director-General of the Department of Mineral Resources and the Regional Managers appointed for each region.¹²³ Most decision-making functions are, however, assigned to the Minister, with the Regional Managers basically functioning as a vehicle for receiving, preliminarily assessing and forwarding applications for permits and rights relating to reconnaissance, retention, prospecting and mining to the Minister.¹²⁴

The MPRD Act places an obligation on the Minister of Minerals and Energy (now the Minister of Mineral Resources) to divide the Republic, the sea and the exclusive economic zone and continental shelf into regions. This must be done by notice in the

¹¹⁹ Section 3(2)(a) of the MPRD Act. See chapter 8 for a discussion of the nature and content of these rights to petroleum.

¹²⁰ Section 3(2)(b) of the MPRD Act.

¹²¹ Section 3(3) of the MPRD Act.

¹²² Hunter T "Sustainable Socio-economic Extraction of Australian Offshore Petroleum Resources through Legal Regulation: Is it Possible?" 2011 *Journal of Energy and Natural Resources Law* 209 at 212.

¹²³ Badenhorst and Mostert (note 95) at 2-2.

¹²⁴ Dale et al (note 95) at MPRDA-154.

Government Gazette.¹²⁵ Acting on this mandate, the Minister divided the Republic of South Africa and the adjacent sea into the following regions:¹²⁶ Western Cape, Northern Cape, Free State, Eastern Cape, KwaZulu-Natal, Mpumalanga, Limpopo, Gauteng and North West. This division was done in accordance with the provincial boundaries described in Schedule 1 of the Interim Constitution¹²⁷ read with section 103 of the Final Constitution.¹²⁸ The sea¹²⁹ and continental shelf¹³⁰ adjacent to and opposite regions with a coastline are included in the regions in the manner set out in the notice.¹³¹

The Director-General of the Department of Mineral Resources must perform certain functions as set out by the MPRD Act. This includes receiving monthly reports, annual financial statements and annual reports from a holder of a right to minerals.¹³² Furthermore, the Director-General must designate officers of the Department to perform the administrative functions of the Minerals and Petroleum Board.¹³³ The Director-General must also confirm or set aside orders, suspensions and instructions issued by persons authorised by the MPRD Act to do so.¹³⁴

A Regional Manager must be appointed by the Director-General for each region, subject to the laws governing the public service. The Regional Manager must perform the functions delegated or assigned to him under the MPRDA or any other law.¹³⁵ The Director-General must also hear administrative appeals from the Regional Managers.¹³⁶

The Minister may delegate most powers, or assign any of the duties conferred under the MPRD Act to the Director-General, the Regional Manager or any officer.¹³⁷ A

¹²⁵ Section 7 of the MPRD Act.

¹²⁶ Government Notice 564 in *Government Gazette* 26319 (RG 7960) of 30 April 2004.

¹²⁷ The Constitution of the Republic of South Africa 200 of 1993.

¹²⁸ The South African Constitution. See Dale et al (note 95) at MPRDA-153.

¹²⁹ As defined in section 1 of the Sea-Shore Act 21 of 1935.

¹³⁰ Referred to in section 8 of the Maritime Zones Act 15 of 1994.

¹³¹ Dale et al (note 95) at MPRDA-153.

¹³² Section 28(2) of the MPRD Act.

¹³³ Section 68 of the MPRD Act.

¹³⁴ Section 93(2) of the MPRD Act.

¹³⁵ Section 8 of the MPRD Act.

¹³⁶ Section 96(1)(a) of the MPRD Act.

¹³⁷ Section 103(1) of the MPRD Act. See Badenhorst and Mostert (note 9) 2-5 – 2-12 for a detailed discussion of the delegation of authority in terms of the MPRDA and PAJA and the possible constitutional challenges that it might hold.

delegation or assignment must be in writing. Further delegation of these powers or duties is possible, so long as it is authorised by the Minister and such further delegation is in writing.¹³⁸ The power to make regulations or deal with any appeal cannot be delegated.

The Minister may designate an organ of State or an agency wholly owned and controlled by the State or a company belonging to State to perform the functions contained in the MPRD Act¹³⁹ in respect of petroleum.¹⁴⁰ A designated state-owned petroleum company is a common feature around the world.¹⁴¹ In line with this, the Minister designated the South African Agency for the Promotion of Petroleum Exploration and Exploitation (Pty) Ltd (“**Petroleum Agency SA**”).¹⁴² Petroleum Agency SA is funded by money appropriated by Parliament.¹⁴³ It may, with the approval of the Minister, provide technical and consulting services and assistance to equivalent agencies of other countries.¹⁴⁴

The functions of the Petroleum Agency SA are prescribed by the MPRD Act.¹⁴⁵ Its functions are very wide¹⁴⁶ and includes, for example, promoting onshore and offshore exploration for and production of petroleum.¹⁴⁷ Petroleum Agency SA must also receive applications for reconnaissance permits, technical co-operation permits, exploration rights and production rights in the prescribed manner¹⁴⁸ and evaluate such applications and make recommendations to the Minister.¹⁴⁹ It must monitor and report regularly to the Minister in respect of compliance with such permits or rights.¹⁵⁰ The Petroleum Agency SA must also bring to the attention of the Minister any information in relation to the exploration and production of petroleum which is likely to be of use or

¹³⁸ Section 103(2) and (3) of the MPRD Act.

¹³⁹ The functions referred to in Chapter 6 of the MPRD Act.

¹⁴⁰ Section 70 of the MPRD Act.

¹⁴¹ Alramahi (note 9) at §1.17.

¹⁴² Government Notice 733, 18 June 2004. *Government Gazette* 26468. See also Badenhorst and Mostert (note 95) at 19-3; Dale et al (note 95) at MPRDA-489.

¹⁴³ Section 72(1) of the MPRD Act.

¹⁴⁴ Section 72(2) of the MPRD Act.

¹⁴⁵ Section 71 of the MPRD Act.

¹⁴⁶ Only the most important functions for purposes of thesis are discussed here.

¹⁴⁷ Section 71(a) of the MPRD Act.

¹⁴⁸ Section 71(b) of the MPRD Act.

¹⁴⁹ Section 71(c) of the MPRD Act.

¹⁵⁰ Section 71(d) of the MPRD Act.

benefit to the State.¹⁵¹

In South Africa, therefore, the state as custodian is placed in complete control over unsevered petroleum resources. This control is exercised with the assistance of the Petroleum Agency SA. The Minister, however, remains responsible for regulating access to petroleum. Both the Minister and the Petroleum Agency SA are administrative bodies and must act reasonably and fairly in the exercise of their functions. This is discussed in Chapter Nine below.

The Namibian Constitution and the Petroleum Act is clear on the role of the state with regard to petroleum resources: these resources, and all rights to these resources, vest in the state. The state may grant private petroleum companies rights to search for and to extract petroleum.¹⁵² The Minister of Mines and Energy is the relevant line minister who is charged with controlling access to petroleum resources.

Under the Petroleum Act, the Minister of Mines and Energy must appoint a Commissioner of Petroleum Affairs¹⁵³ (“**Commissioner**”) and a Chief Inspector of Petroleum Affairs¹⁵⁴ (“**Chief Inspector**”). These two officers must exercise or perform, subject to the direction and control of the Minister, the powers, duties and functions conferred or imposed upon any of them by or under the provisions of the Petroleum Act and such other functions as may be imposed upon them by the Minister.¹⁵⁵ The Commissioner and Chief Inspector are assisted by such other officers as may be designated by the Permanent Secretary: Mines and Energy for such purpose.¹⁵⁶

Furthermore, in Namibia there is also a state petroleum company, the National Petroleum Corporation of Namibia (Pty) Ltd (“**Namcor**”). Namcor is a private company with the Government of the Republic of Namibia as its sole shareholder.¹⁵⁷

¹⁵¹ Section 71(f) of the MPRD Act.

¹⁵² Section 2 of the Petroleum Act.

¹⁵³ Section 3(1)(a) of the Petroleum Act.

¹⁵⁴ Section 3(1)(b) of the Petroleum Act.

¹⁵⁵ Section 3(1) of the Petroleum Act.

¹⁵⁶ Section 3(2) of the Petroleum Act.

¹⁵⁷ Namcor “About Us” available at <http://www.namcor.com.na/about-us> [accessed 02.02.2014].

Namcor was given statutory recognition in the Petroleum Act.¹⁵⁸ The functions of Namcor are described in section 8 of the Petroleum Act.¹⁵⁹ It includes, for example, carrying out, whether on its own or together with any other person, reconnaissance operations or, in terms of a licence, exploration operations or production operations¹⁶⁰ or carrying out on behalf of the State any reconnaissance operations, exploration operations or production operations together with any other person.¹⁶¹ Namcor must also assist the Commissioner on his request in the exercise by him of his powers, duties and functions under the Petroleum Act.¹⁶²

The Minister of Mines and Energy can require Namcor to carry out reconnaissance operations, exploration operations and production operations, whether on its own or together with any other person.¹⁶³ The White Paper on Energy recognises that, although Namcor is empowered to carry out upstream activities, the Namibian Government prefers that these activities are carried out by the private sector.¹⁶⁴ It does state, however, that where the state does compete with other players in petroleum exploration and production, “this will be by means of commercialised state companies, treated on the same terms as other players.”¹⁶⁵ It is uncertain whether the White Paper envisages Namcor to be the “commercialised state company”, but in practice this will probably be the case, as Namibia does not have any other state company involved in the petroleum industry.

Aside from requiring Namcor to conduct upstream activities, the Minister may also require Namcor to carry out any process of refining, or disposing of, or dealing in, petroleum or any by-products of such petroleum, or to take part in any such process carried out by any other person.¹⁶⁶ Finally, the Minister may require Namcor to advise or otherwise assist the Minister in relation to, or in any negotiations in relation to any

¹⁵⁸ Section 8 of the Petroleum Act.

¹⁵⁹ Section 8(1)(b)–(d) of the Petroleum Act.

¹⁶⁰ Section 8(1)(b) of the Petroleum Act.

¹⁶¹ Section 8(1)(c) of the Petroleum Act.

¹⁶² Section 8(1)(d) of the Petroleum Act.

¹⁶³ Section 8(1)(a)(i) of the Petroleum Act.

¹⁶⁴ Paragraph 3.2.4. of the White Paper on Energy.

¹⁶⁵ The White Paper on Energy at par 3.2.4.1.

¹⁶⁶ Section 8(1)(a)(ii) of the Petroleum Act.

petroleum agreement, or in relation to the discovery of, petroleum or the development of petroleum resources.¹⁶⁷

Although the Petroleum Act empowers Namcor to operate widely in the petroleum sector, including exploration and production, refining, and liquid fuels marketing, Namcor has thus far limited its activities to promotion of Namibian acreage. This includes data gathering and marketing, technical management of exploration activities and the rendering of advice to the Ministry of Mines and Energy.¹⁶⁸ Despite this, however, it has become practice for the Ministry to require Namcor to be a party (normally a minority party) to a petroleum licence.¹⁶⁹

3. Concluding Remarks

The South African choice of a custodianship model – with its obvious view of enhancing the welfare of its people – may be laudable as opposed to the more sterile approach in Namibia. However, Namibia’s approach to the regulation of its petroleum resources has been consistent for about a century, whereas its South African counterpart has gone through various changes in focus. The consistency and predictability of the Namibian approach may in the long run be more sustainable and welfare enhancing than the South African approach, which seems to focus on more immediate goals.¹⁷⁰ In order to attract investment, “a clear, simple, and nondiscretionary legal and regulatory framework is a crucial factor.”¹⁷¹

The preceding two chapters sketch the backdrop against which the analysis in the following section is to take place. Chapter Two provides a general overview of the basic aspects of the petroleum industry. Chapter Three discusses the general rules governing ownership of, control over and access to the resource. It deals with the rule of international law that states have permanent sovereignty over the natural resources

¹⁶⁷ Section 8(1)(a)(iii) of the Petroleum Act.

¹⁶⁸ See The White Paper on Energy at par 3.2.

¹⁶⁹ Koep & Partners “Namibia” *Africa Oil and Gas* published by Freshfields Bruckhaus Deringer at 2, available at http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insight/Africa_ENR/Namibia/Namibia%20oil%20and%20gas.pdf [accessed 26.03.2015].

¹⁷⁰ Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 104.

¹⁷¹ Barma et al (note 170) at 104.

within their boundaries territorial waters, exclusive economic zone and continental shelf.¹⁷² The entitlements and obligations of states are set out there very generally.¹⁷³

The purpose of this chapter is to provide an overview of the general regulatory framework within which petroleum exploitation takes place. It emphasises the two main legislative spheres for petroleum resources, namely the Constitution as the supreme law and the MPRD Act and Petroleum Act as the general legislative measures dealing with petroleum resources in South Africa and Namibia respectively. This chapter provides a general overview of the ownership of petroleum resources within a constitutional sphere. It also discusses the aims and objectives of the specific legislation dealing with petroleum resources and the regulation of access to petroleum resources. It therefore provides the skeleton of the petroleum regulatory framework in South Africa and Namibia. The following four chapters will give further content to this regulatory framework by discussing the specific aspects of access to and control over petroleum resources in these two jurisdictions. Chapter Nine then discusses how the state's role in regulating petroleum resources is limited.

¹⁷² See paragraph 2 of Chapter Three above.

¹⁷³ See paragraph 2 of Chapter Three above.

Chapter Five:

PROMOTING SECURITY OF TENURE: THE MEANING OF PETROLEUM AND THE NATURE AND SUBSTANCE OF RIGHTS TO PETROLEUM

1. Introduction

Uncertainty in the regulatory framework for oil and gas is identified as one of the major challenges facing emerging players in this industry. Such uncertainty may be the result of a lack of transparency regarding the procedure through which rights to petroleum are granted.¹ This chapter examines the measures employed by the state to grant petroleum companies access to the petroleum resources of Namibia and South Africa, in an attempt to give content to the nature and substance of access to petroleum. If the nature and substance of access to petroleum is transparent, security of tenure of holders of rights to petroleum is promoted. This in turn promotes accountability within a petroleum regulatory framework in that the rights and obligations of the holder and the state are clearly defined. Transparency and accountability work together toward protecting the interests of both the petroleum company and the citizens of the host nation.

In South Africa and Namibia, ownership of and control over petroleum resources are vested in the state.² The state is the conduit through which access to petroleum resources is granted.³ The state grants access to these resources to petroleum companies by granting rights to search for (by means of reconnaissance and exploration operations) and extract (by means of production operations) petroleum resources. The

¹ PricewaterhouseCoopers *From Promise to Performance: Africa Oil and Gas Review* (2012), available at https://www.pwc.com/en_NG/ng/pdf/pwc-africa-oil-and-gas-review.pdf [accessed 13.04.2015].

² See Chapter Four above.

³ See Chapter Four above at par 2.3.

exploitation of petroleum resources creates a “symbiotic relationship” between the host state and the petroleum company; both are dependant on each other for exploitation of petroleum to occur.⁴ The petroleum company needs the state in order to gain access to the resource, while the state needs to petroleum company to exploit this resource.⁵ This relationship between the state and a petroleum company is primarily determined by the nature and content of the rights granted to a petroleum company by the state.⁶ In turn, the nature and content of these rights are for the most part determined by the legislation dealing with the upstream petroleum industry in these two countries, namely the Mineral and Petroleum Resources Development Act 33 of 2002 (“**MPRD Act**”) in South Africa and the Petroleum (Exploration and Production) Act 2 of 1991 (“**Petroleum Act**”) in Namibia.

The MPRD Act and the Petroleum Act only apply to resources that qualify as petroleum under the definitions provided in these two Acts. The basic characteristics of petroleum were discussed in Chapter Two above, but the legislature in South Africa and Namibia has ascribed a specific definition for petroleum. It is therefore necessary, before the nature and content of rights to petroleum are discussed, to determine what exactly is meant by petroleum. The rights to petroleum that this chapter discusses can only be awarded in respect of resources that fall under the definition of petroleum in the two Acts.

2. The Meaning of Petroleum in terms of South African and Namibian Legislation

Chapter Two above discusses the *geological* understanding of petroleum. The South African MPRD Act and the Namibian Petroleum Act, however, only apply to resources which fall under the *statutory definition* of petroleum. In line with other statutory

⁴ Hunter T *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis* (unpublished PhD-thesis, University of Bergen, 2010) at 74 – 75.

⁵ Hunter (note 2) at 75.

⁶ See Chapter Five above.

definitions for petroleum,⁷ the MPRD Act follows a wide meaning of petroleum. Petroleum is defined as:

“any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit”⁸

The phrase “any liquid, solid hydrocarbon” contains a grammatical oversight, and should rather read “any liquid or solid hydrocarbon”, since petroleum includes any liquid hydrocarbon and not any liquid in general.⁹ This is supported by the fact that the second line of the definition correctly refers to “any such liquid or solid hydrocarbon”.¹⁰ This is further supported by the geological definitions of petroleum discussed in Chapter Two above, statutory definitions for petroleum in other jurisdictions, and the definition of “natural oil” under the repealed Natural Oil Act.¹¹

The Namibian Petroleum Act also has a wide definition of petroleum, similar to the definition of petroleum in the MPRD Act. It defines petroleum as:

⁷ So, for example, section 1 of the United Kingdom Petroleum Act 17 of 1998 defines petroleum as “...includ[ing] any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata; but does not include coal or bitumenous shales or other stratified deposits from which oil can be extracted by destructive distillation.” The Australian Petroleum and Geothermal Energy Act of 2000, Part 1 Division 3, defines petroleum as “...a naturally occurring substance consisting of a hydrocarbon or mixture of hydrocarbons in gaseous, liquid or solid state but does not include coal or shale unless occurring in circumstances in which the use of techniques for coal seam methane production or in situ gasification would be appropriate or unless constituting a product of coal gasification (whether produced below or above the ground) for the purposes of the production of synthetic petroleum.”

⁸ Section 1 of the MPRDA, *sv* “petroleum”.

⁹ Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* 1 ed (2005 Service Issue 16 2014) Durban LexisNexis Butterworths at MPRDA-71, where the authors refer to the unqualified reference to “any liquid” as a “patent error”. See also Badenhorst PJ and Shone R “‘Minerals’, ‘Petroleum’ and ‘Operations’ in the Mineral and Petroleum Resources Development Act 28 of 2002: A Geologist as Devil’s Advocate for a Change?” 2008 *Obiter* 33 at 45.

¹⁰ Dale et al (note 9) at MPRDA-71.

¹¹ The Natural Oil Act 46 of 1942 defines “natural oil” as “...any liquid or solid hydrocarbon or combustible gas existing in a natural condition in the earth’s crust, but shall not include coal or bituminous shales or other stratified deposits from which oil can be obtained by destructive distillation, or gas arising from marsh or other surface deposits.” See section 1 of the Natural Oil Act 46 of 1942, *sv* “natural oil”.

“any liquid or solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas which has in any manner been returned to such natural condition, but shall not include coal, bituminous shales or other stratified deposits from which oil can be obtained by destructive distillation, or gas arising from marsh or other surface deposits”¹²

The definitions of petroleum in the MPRD Act and the Petroleum Act exclude certain substances. Although these substances are explicitly excluded, they will be excluded in any event, since they do not meet the requirements for petroleum. So, for example, coal, bituminous shale and other stratified deposits from which oil can be manufactured when employing a process of destructive distillation¹³ do not qualify as petroleum. The product formed by the process of destructive distillation is also excluded from the definition of petroleum because it does not occur in a natural condition. Coal falls under the definition of “mineral”, since it is a solid substance, primarily of carbonaceous material, which occurs naturally in the earth and is formed by a geological process.¹⁴

Scholarly interpretations of the definition of petroleum further exclude certain products: Petroleum derived by Sasol Limited through destructive distillation of coal is excluded.¹⁵ Furthermore, petroleum stored in disused mine shafts do not occur in its natural condition and is therefore excluded from the definition of petroleum.¹⁶ Oil produced from oil shale is also excluded.¹⁷ Although Dale *et al* do not explain these exclusions, it is most likely because these substances do not occur naturally, but has to be manufactured through a process of destructive distillation of coal or oil shale. For example, oil shale is shale that contains organic substances that produces liquid

¹² Section 1 of the Namibian Petroleum Act, *sv* “petroleum”.

¹³ “Destructive distillation” may be defined as “decomposition of a substance (as wood, coal, or oil) by heat in a closed container and collection of the volatile products produced”. See Merriam Webster “Destructive Distillation” available at <http://www.merriam-webster.com/dictionary/destructive%20distillation> [accessed 02.02.2014].

¹⁴ Hyne N *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production* 2 ed (2001) Tulsa PennWell Corporation at 464. See also Dale *et al* (note 9) at MPRDA-71.

¹⁵ Dale *et al* (note 9) at MPRDA-72.

¹⁶ Dale *et al* (note 9) at MPRDA-72.

¹⁷ Dale *et al* (note 9) at MPRDA-72.

hydrocarbons on distillation.¹⁸ It does not contain free petroleum.¹⁹ Oil shale is therefore a stratified deposit from which oil can be manufactured when employing a process of destructive distillation and is excluded from the definition of petroleum.

The inclusion of gaseous hydrocarbons in the definition of petroleum is limited to combustible natural gas. Marsh gas, as well as all other non-combustible gas, falls under the definition of “mineral” as long as the gas occurs naturally and is formed by or subjected to a geological process.²⁰ It is therefore presumed that all non-combustible gas will rather fall under the definition of mineral if the requirements for a mineral are met.²¹

Whether a hydrocarbon exists in a solid, liquid or gaseous state depends on the molecular composition, pressure and prevailing reservoir temperature.²² Liquid hydrocarbons are generally referred to as natural oil, while gaseous hydrocarbons are referred to as natural gas.²³ Natural gas can be classified as either associated natural gas, which refers to natural gas generated in association with some type of oil, or non-associated natural gas, which refers to natural gas generated in association with coal.²⁴ The adjective “natural” indicates that the hydrocarbons exist in natural conditions, as opposed to manufactured hydrocarbons.²⁵ Only hydrocarbons that exist in a natural condition qualify as petroleum.

The recent application by Royal Dutch Shell for exploration rights in respect of shale gas in the Karoo highlights the importance of a proper understanding of petroleum.²⁶ One commentator opined that shale gas does not fall under the definition of petroleum, as it is an unconventional gas “...that has to be subjected to an artificial hydrological

¹⁸ Allaby M (ed) *Oxford Dictionary of Earth Sciences*, (2008) Oxford, Oxford University Press at 402; Jones C (ed) *Illustrated Dictionary of Geology*, (2010) New Delhi, Lotus Press at 135.

¹⁹ Allaby (note 14) at 402.

²⁰ See section 1 of the MPRD Act, *sv* “mineral” for the definition of mineral. See also Dale et al (note 9) at MPRDA-72 and Badenhorst and Shone (note 9) at 42 – 45.

²¹ See section 1 of the MPRD Act, *sv* “mineral” for the definition of mineral. See also Dale et al (note 9) at MPRDA-72 and Badenhorst and Shone (note 9) at 42 – 45.

²² Taverne B *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* 2 ed (2008) at 1; Lowe JS *Oil and Gas Law in a Nutshell* 5 ed (2009) at 1.

²³ Lowe JS *Oil and Gas Law in a Nutshell* 5 ed (2009) at 1.

²⁴ Taverne (note 18) at 1.

²⁵ Taverne (note 18) at 1.

²⁶ See Chapter One above.

fracturing process before becoming a liquid, solid, hydrocarbon or combustible gas” and therefore falls outside the definition of petroleum in the MPRD Act.²⁷ This statement, however, is not further qualified or discussed in any detail. If this statement is correct, Shell’s entire application would be invalid. The crux of this statement seems to be that shale gas does not occur naturally but is “created” by hydraulic fracturing.

Shale gas is an unconventional natural gas that is produced from shale formations, which function as both source and reservoir rock for the shale gas.²⁸ Shale is a common sedimentary rock composed of clay-sized and silt-sized particles.²⁹ It has thin layers and is able to split into small chips.³⁰ Shale gas is unconventional because it is not produced like traditional gas. The shale reservoir requires stimulation or other expensive recovery techniques to remove the gas from the shale.³¹ Hydraulic fracturing therefore does not create the shale gas, but merely releases it from its natural conditions by stimulating the reservoir. Shale gas is composed primarily of methane gas, normally 90% or more methane.³² As a result, it is combustible.³³

Shale gas thus complies with the two requirements for petroleum, in that it is a combustible gas and exists in a natural condition (inside the shale rock). Importantly, shale gas is not manufactured or created by the process of hydraulic fracturing, but merely released from the reservoir rock through hydraulic fracturing. Shale gas therefore falls under the definition of petroleum in the MPRD Act. As a result, to

²⁷ Bekker F *Review of the Draft EMP in Support of an Application for Gas Exploration in the Western Karoo (Central Precinct) by Shell Exploration Company* (2011) Report Prepared in Response to the Publication for Public Comment of Shell's EMP, Stilbaai Clean Stream Environmental Services at 37.

²⁸ Arthur JD et al *Evaluating the Environmental Implications of Hydraulic Fracturing in Shale Gas Reservoirs* (2008) Research Paper Prepared by ALL Consulting at 3; Downey M *Oil 101* (2009) at 178; US Energy Information Administration “What is Shale Gas and Why is it Important?” available at <http://geology.com/energy/shale-gas/> [accessed 02.02.2014]; American Petroleum Institute “Facts About Shale Gas” available at http://www.api.org/policy/exploration/hydraulicfracturing/shale_gas.cfm [accessed 02.02.2014]; Ground Water Protection Council and ALL Consulting *Modern Shale Gas Development in the United States: A Primer* (2009) Washington DC Office of Fossil Energy, US Department of Energy at ES-1 and 7, available at http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf [accessed 08.06.2011].

²⁹ Hyne NJ *Nontechnical Guide to Petroleum Geology, Exploration, Drilling, and Production* 2 ed (2001) at 525;

³⁰ Jones C (ed) *Illustrated Dictionary of Geology* (2010) New Delhi Lotus Press at 170.

³¹ Downey M *Oil 101* (2009) at 178.

³² Arthur (note 24) at 3; Downey (note 27) at 178.

³³ See also Badenhorst PJ, Mostert H and Dendy M “Minerals and Petroleum” in Joubert WA (ed) *LAWSA Vol 18* 2 ed (2007) at par 14.

exploit shale gas, the company interested in doing so must apply for one of the rights to petroleum, discussed below.³⁴

Comparing the definition of petroleum in both the MPRD Act and the Petroleum Act, it becomes apparent that both contain the same two requirements for a substance to qualify as petroleum.³⁵ First, it must be a liquid hydrocarbon or solid hydrocarbon or combustible gas; and second, it must exist in a natural condition in the earth's crust or must have returned to a natural condition in the earth's crust.³⁶ Substances meeting these requirements will be regulated by the MPRD Act in South Africa and the Petroleum Act in Namibia.

3. The Nature and Substance of Rights to Petroleum

A petroleum legislative framework designed to foster development should be clear about how petroleum operations are regulated. This entails including relevant provisions within the legislation clearly setting out how access to petroleum resources is granted.³⁷ The MPRD Act and the Petroleum Act regulate access to petroleum resources in South Africa and Namibia respectively. Access to these resources is obtained by applying for the relevant rights, which are issued by the state. These rights are either for the searching for petroleum (through reconnaissance or exploration operations) or for the extraction of petroleum (through production operations).

3.1 Instruments for Granting Access to Petroleum

In Namibia the state grants *licences* in respect of petroleum, while in South Africa the state grants *rights*. The question is, however, whether there is any difference in the two. Both are more administrative in nature than contractual (such as production sharing contracts and service contracts).³⁸ Both grant exclusivity to the holder thereof

³⁴ See paragraph 3.1.1. below.

³⁵ Badenhorst and Shone (note 5) at 45.

³⁶ Dale et al (note 9) at MPRDA-71 argue that the reference to "gas" in the phrase "...which gas has..." is a patent typographical error which must be read as *pro non scripto*. The second requirement is that the liquid hydrocarbon, solid hydrocarbon or natural gas must exist in a natural condition in the earth's crust, or must have returned to a natural condition in the earth's crust. This second part of the second requirement is not limited to gas only, as the definition in section 1 of the MPRD Act suggests.

³⁷ Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 9.

³⁸ See Chapter Two above.

(although the extent of exclusivity differs), who also becomes owner of the resources once they are extracted. The holder, however, also carries most of the risk involved in working the right or licence. The state carries very little risk but also enjoys very little benefit. Both are granted over a specific area for a specific period and retains a strong regulatory flavour.³⁹

The effect is therefore that there is very little difference in the types of rights granted in respect of petroleum in South Africa and Namibia. There are, however, slight differences in the content of these authorisations, which are discussed below.

3.2 The Nature of Rights to Petroleum

Authorisations to explore for and to produce petroleum raise vexing issues, such as whether these authorisations confer contractual rights and obligations or whether they amount to proprietary interests.⁴⁰ The answers lie in the statutes creating the authorisations and the context within which authorisations are granted.⁴¹ Sometimes the statute is clear on the nature of the right, as in South Africa where exploration and production rights are characterised as limited real rights.⁴² Mostly, though, the nature of the rights must be inferred, as is the case in Namibia.⁴³

By nature, rights can be personal or real.⁴⁴ In *Ex Parte Geldenhuys*,⁴⁵ the court held that to determine whether rights are personal or real, one must look at the correlative obligation imposed by the right. If that correlative obligation imposes a burden on the land (or amounts to a subtraction from the dominium), the corresponding right is real and registrable. If the correlative obligation is merely an obligation binding a person, the corresponding right is personal.⁴⁶ This test, which became known as the “subtraction from the dominium”-test, has been applied in various forms by different courts in South Africa. In *Lorentz v Melle*,⁴⁷ for example, the court held that for a right to be real, it had to impose a physical curtailment on the owner’s use and enjoyment of

³⁹ See also Chapter Three above.

⁴⁰ Crommelin M “The Legal Character of Resource Title” (1998) *AMPLJ* 57 at 57.

⁴¹ Crommelin (note 33) at 57.

⁴² See section 5(1) of the MPRD Act. See also Crommelin (note 33) at 57.

⁴³ The Petroleum Act is silent as to nature of exploration and production licences.

⁴⁴ Badenhorst, Mostert and Dendy (note 29) at par 116.

⁴⁵ *Ex parte Geldenhuys* 1926 OPD 155

⁴⁶ *Geldenhuys* (note 38) at 162.

⁴⁷ *Lorentz v Melle* 1978 (3) SA 1044 (T).

the land.⁴⁸ In *Cape Explosive Works Ltd v Denel (Pty) Ltd*,⁴⁹ the Supreme Court of Appeal in South Africa held that two requirements must be met before a right is real: (1) the person who created the right must intend to bind not only the present owner of the land, but also successors in title; and (2) the nature of the right or condition must be such that the registration of it results in a subtraction from the dominium of the land against which it is registered.⁵⁰

The question of whether authorisations to search for and to extract petroleum are real or personal in nature by extension deals with the question whether these rights are capable transferred or encumbered by mortgage bonds.⁵¹ This is important for investors, who may want to use these rights to raise capital. Furthermore, if rights are real in nature, then it also raises issues of possible expropriation if these rights are cancelled or suspended. If the rights are real, investors who are granted these rights enjoy the additional protection that the relevant Constitutions offer in respect of property.⁵²

Under the MPRD Act, exploration and production rights in South Africa are limited real rights in respect of the petroleum and the land to which the petroleum relates.⁵³ Holders of exploration and production rights are obliged to register these rights in the Mineral and Petroleum Titles Registration Office.⁵⁴ A limited real right is only created upon registration in the Mineral and Petroleum Titles Registration Office.⁵⁵ Once it is registered, exploration and production rights are binding on third parties.⁵⁶ Any transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of an exploration right must be lodged for registration at the Mineral and Petroleum Titles Registration Office.⁵⁷

The MPRD Act is silent as regards the nature of reconnaissance permits and technical co-operation permits. Technical co-operation permits are mere permits and

⁴⁸ Lorentz (note 40) at 1052F.

⁴⁹ *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA)

⁵⁰ *Cape Explosive Works* (note 42) at 578D – E.

⁵¹ Badenhorst, Mostert and Dendy (note 29) at par 116.

⁵² Section 25 of the South African Constitution, 1996 and article 16 of the Namibian Constitution. See, however, the discussion in paragraph 3.3.1.1 below.

⁵³ Section 5(1) of the MPRD Act. See also Badenhorst, Mostert and Dendy (note 29) at par 116.

⁵⁴ Section 82(2)(a) and section 86(2)(a) of the MPRD Act.

⁵⁵ Section 2(4) of the Mining Titles Registration Act 16 of 1967.

⁵⁶ Section 2(4) of the Mining Titles Registration Act.

⁵⁷ Section 11(4) of the MPRD Act.

administrative in nature. They are unique to South Africa and to the MPRD Act, but are similar to agreements entered into prior to the MPRD Act.⁵⁸ They do not constitute a subtraction from the *dominium* and are therefore not limited real rights but personal rights.⁵⁹

As with technical co-operation permits, reconnaissance permits are personal to the holder thereof.⁶⁰ The fact that reconnaissance permits and technical-co-operation permits are personal in nature is further supported by the fact that they are not transferable and may not be encumbered.

In South Africa, therefore, exploration and production rights are limited real rights. Holders of these rights may encumber the rights to raise capital⁶¹ and also enjoy the protection of the constitutional property clause. Reconnaissance permits and technical co-operation permits, on the other hand, are personal in nature. They cannot be encumbered to raise capital. In principle, these permits are not considered constitutional property for purposes of the constitutional property clause. However, the tendency is to regard permits as constitutional property if they have a commercial value and once they have been vested in and acquired by the holder according to the relevant statutory requirements.⁶²

Unlike its South African counterpart, the Namibian Petroleum Act is silent as to the nature of rights to petroleum. When one applies the subtraction from the dominium test to reconnaissance licences, exploration licences and production licences, it may be argued that these licences are, in fact, limited real rights. Reconnaissance, exploration and production operations take away the rights of the landowner by granting the holder of licences in respect of these operations authority to enter and use the land without

⁵⁸ Dale et al (note 9) at MPRDA-501.

⁵⁹ Dale et al (note 9) at MPRDA-501. See, however, the contradictory view in the same work at MPRDA-134.

⁶⁰ See for example Dale et al (note 9) at MPRDA-220 where reconnaissance permissions are discussed.

⁶¹ See par 3.3.5 below.

⁶² Van der Walt AJ *Constitutional Property Law* (2005) Wetton Juta & Co Ltd at 100.

unreasonable interference by the landowner. Furthermore, the rights that holders have are enforceable against successors in title to the owner.⁶³

In principle, therefore, it appears that reconnaissance licences (unlike reconnaissance permits in South Africa), exploration licences and productions licences in Namibia may be limited real rights. These licences may also be transferred and encumbered. Nevertheless, Namibia does not have a title office similar to the Mineral and Petroleum Titles Registration Office in South Africa. Also, in practice these licences are not registered in the central Deeds Registry. However, because the rights may be considered to be limited real rights, they are constitutional property for purposes of the Namibian constitutional property clause.⁶⁴

3.3 Rights to Petroleum

The types of authorisations granted in Namibia and South Africa generally exclude state participation and production sharing, while vesting the exclusive ownership of petroleum produced in the right holder.⁶⁵ In both South Africa and Namibia the state may grant authorisations to search for petroleum (either reconnaissance permits or licences or exploration rights or licences) or to produce petroleum (production rights or licences). This is in line with a number of jurisdictions across the globe, where the authorisations to search for petroleum is separate from the authorisation to extract petroleum.⁶⁶ In South Africa, there is a fourth possible authorisation that the state may grant in respect of petroleum, namely a technical co-operation permit. This permit does

⁶³ Neither the legislation nor practice deals with the change of ownership of land upon which a petroleum licence has been granted.

⁶⁴ Article 16 of the Constitution of the Republic of Namibia, 1990.

⁶⁵ See Chapter Three above.

⁶⁶ For example, under the *EC Directive 94/22/EC* (the primary European Union document dealing with petroleum exploration and production), member states may grant authorisations to prospect and explore for and produce petroleum. See article 2 and article 3 of the *EC Directive 94/22/EC*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994L0022:EN:HTML> [accessed 13.01.2015]. In the United Kingdom, one of the EU member states, licences may be granted to explore for and bore (produce) petroleum. See Section 3(1) of the Petroleum Act 1998. The same applies in Australia in terms of part 2.2 and part 2.4 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) and in the Netherlands in terms of article 2 of the Mining Act 2003 (*Mijnbouwwet* 2003). In Angola in terms of article 4 of *Lei 10_04 de 12 de Novembro das Actividades Petroliferas* (Petroleum Activities Law), all rights in respect of upstream petroleum resources are granted to the Sociedade Nacional de Combustíveis de Angola, Empresa Pública - (Sonangol, E.P.), the national concessionaire. In terms of article 8, the supervising Minister may grant prospecting rights, while the Government shall be responsible for granting concessions for the exercise of mining (production) rights.

not relate to the searching or extracting of petroleum, but rather allows the holder to conduct desktop studies.⁶⁷

3.3.1 Types of Rights in Respect of Petroleum

To be transparent and promote security of tenure, a legislative regime for petroleum should be clear on a number of points in respect of the types of rights to petroleum.⁶⁸ First, it should make a clear distinction between the different types of authorisations available. Secondly, it should circumscribe the operations allowed under each type of authorisation in sufficient detail to enable any person to be able to link the activities they intend to conduct with the relevant authorisation. Thirdly, it should, in addition to setting out the relevant allowable operations, be clear as to all additional powers and privileges that the holder of a licence has. Finally, the petroleum legislative regime should be clear on the period for which the authorisation is granted.

The type of right or licence that may be awarded to an applicant will determine the applicant's relationship with the state and grants a company access to petroleum resources situated in South Africa and Namibia. In South Africa, the state can grant four different types of rights in respect of petroleum: reconnaissance permits, technical co-operation permits, exploration rights and production rights. The Namibian Petroleum Act determines the content of petroleum licences: the state can grant three types of licences in respect of petroleum, namely reconnaissance licences, exploration licences and production licences.

3.3.1.1 Rights relating to reconnaissance or exploration activity

South Africa and Namibia are two of only a handful of countries that distinguish between reconnaissance and exploration operations in their laws. Other jurisdictions that do the same include Mauritania,⁶⁹ Morocco⁷⁰ and Mozambique.⁷¹ Although the distinction between reconnaissance rights and licences and exploration rights and

⁶⁷ See par 3.3.1.3 below.

⁶⁸ Onorato (note 37) at 13.

⁶⁹ The new Crude Hydrocarbons Code of Mauritania provides for reconnaissance authorisations, while its predecessor, Ordinance No 88.151 of 1988, does not provide for this. See Ernst & Young *Global Oil and Gas Tax Guide 2014* Ernst & Young at 331 (available at [http://www.ey.com/Publication/vwLUAssets/EY-Global-oil-and-gas-tax-guide-2014/\\$FILE/EY-Global-oil-and-gas-tax-guide-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Global-oil-and-gas-tax-guide-2014/$FILE/EY-Global-oil-and-gas-tax-guide-2014.pdf) [accessed 13.01.2015]).

⁷⁰ Law No 21-90 of the Kingdom of Morocco, chapter II.

⁷¹ Article 29 of the new Petroleum Law No 21/2014 of Mozambique.

licences at first glance seem somewhat opaque, a proper understanding of the nature of operations permitted under these rights and licences and the intention of the legislature makes the distinction clearer. The legislation is also quite clear as to what rights the holder of each right, permit or licence have. A closer look at the MPRD Act and the Petroleum Act distinguishes between the types of rights, permits and licences for which a company may apply to search for and extract petroleum.

In South Africa, a reconnaissance permit is awarded to a person who intends to search for petroleum by means of reconnaissance operations, while in Namibia a reconnaissance licence is granted. Similarly, in South Africa an exploration right is awarded to a person who intends to search for petroleum by means of exploration operations, while in Namibia a reconnaissance licence is granted. The discussion below follows the more elaborate definitions in South African legislation, which overlap to a large extent with its Namibian counterpart. Where Namibian law deviates, this is stated and explained

A reconnaissance permit in South Africa allows its holder to carry on reconnaissance operations.⁷² “Reconnaissance operations”, in respect of petroleum, means any operations carried out for or in connection with the search for petroleum by geological, geophysical and photogeological surveys.⁷³ It includes any remote sensing techniques, but excludes exploration operations.⁷⁴ A reconnaissance licence holder in Namibia may carry on reconnaissance operations in the block or blocks specified in the licence.⁷⁵ There, “reconnaissance operations” has the same meaning as in the South African legislation⁷⁶ and it includes the same techniques.⁷⁷

The South African definition of reconnaissance operations excludes exploration operations. This is problematic, because the techniques described in Chapter Two above (geological, geophysical and photogeological surveys) are accepted methods of exploration.⁷⁸ The definition of reconnaissance operations in respect of reconnaissance

⁷² Dale et al (note 9) at MPRDA-97.

⁷³ Section 1 of the MPRD Act, *sv* “reconnaissance operation”.

⁷⁴ Section 1 of the MPRD Act, *sv* “reconnaissance operation”.

⁷⁵ Section 22(1) of the Petroleum Act.

⁷⁶ Section 1 of the Petroleum Act, *sv* “reconnaissance operations”.

⁷⁷ Section 1 of the Petroleum Act, *sv* “reconnaissance operations”.

⁷⁸ See Chapter Two.

permissions for *minerals* excludes prospecting operations as well.⁷⁹ In this case, however, the distinction is easier to draw. Prospecting operations involve a physical disturbance of the surface or subsurface of the land, while reconnaissance operations take place from a distance.⁸⁰ Exploration operations, however, are not limited to activities which involve a physical disturbance of the surface or the subsurface.

On a practical level reconnaissance operations are “less invasive” exploration operations.⁸¹ Stated in another way, reconnaissance operations are limited to exploration operations involving remote sensing techniques (or surveying).⁸² As such, they are also not subject to the same strict regulation as exploration or production operations.⁸³ A holder of a reconnaissance permit also does not have the ancillary rights granted to a holder of an exploration or production right.⁸⁴

Another way to distinguish between reconnaissance and exploration operations is to look at the intention of the person who conducts the operations: exploration operations are aimed at defining a trap to be tested with the intention of locating a discovery.⁸⁵ When this intention is absent, activities conducted through remote sensing techniques are reconnaissance operations as opposed to exploration operations.⁸⁶ This is, however, not a satisfactory explanation, as reconnaissance operations are obviously also ultimately aimed at locating petroleum, although this is not specifically stated. The Petroleum Law No 21/2014 of Mozambique contains a more satisfactory explanation of what reconnaissance activities entails. This law states that a reconnaissance concession contract grants a non-exclusive right “to carry out preliminary exploration work and assessment operations in the concession contract area, through airborne, terrestrial and other surveys, including geophysical, geo-chemical, paleontological, geological and

⁷⁹ Section 1 of the MPRD Act, *sv* “reconnaissance operation”

⁸⁰ See Dale et al (note 9) at MPRDA-96. “Prospecting operations” is defined in section 1 of the MPRD Act, *sv* “prospecting operations” as “intentionally searching for any mineral by means of any method (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or (b) in or on any residue stockpile or residue deposit, to establish the existence of any mineral and to determine the extent and economic value thereof; or (c) in the sea or other water on land”.

⁸¹ Dale et al (note 9) at MPRDA-97.

⁸² See Chapter Two.

⁸³ Dale et al (note 9) at MPRD-96.

⁸⁴ Section 5(3) of the MPRD Act.

⁸⁵ See section 1 of the MPRD Act, *sv* “exploration operations”.

⁸⁶ Dale et al (note 9) at MPRDA-44.

topographical studies.”⁸⁷ From this explanation, it is clear that reconnaissance operations are *preliminary* exploration operations (not limited to remote sensing techniques). This may be brought in line with the “less invasive” explanation above, which explains reconnaissance operations are merely involving surveying.

The definition of reconnaissance operations in the Namibian Petroleum Act is less problematic than the definition in the MPRD Act, in that it does not exclude exploration operations. However, the effect is the same. All remote sensing techniques carried out in connection with the search for petroleum constitute reconnaissance operations. As discussed below in respect of exploration licences, the Petroleum Act also does not emphasise the intention of the person doing the searching. As with South Africa, reconnaissance operations is limited to surveying, which is less invasive than other means of searching for petroleum provided for under an exploration licence.

In Namibia, an exploration licence holder may exclusively carry on exploration operations in the block or blocks to which it relates subject to such terms and conditions and in such block or blocks as may be specified in such licence.⁸⁸ Exploration operations under the Petroleum Act are defined in much broader terms than the MPRD Act. It means any operations carried out for or in connection with the exploration for petroleum, and includes geological, geophysical, geochemical, paleontological, aerial, magnetic, gravity or seismic surveys and the appraisal of such surveys. It also includes drilling for appraisal purposes and the study of the feasibility of any production operations or development operations to be carried out in such licence area or of the environmental impact of such operations.⁸⁹ In South Africa, exploration rights authorise the holder thereof to search for petroleum. An exploration right holder is entitled to the rights conferred on him under the MPRD Act or any other law.⁹⁰ In broad terms, an exploration right holder may conduct exploration operations,⁹¹ which includes more than just surveying authorised in terms of the reconnaissance permit and may involve physical disturbances of the land. The MPRD Act defines “exploration operation”, which is in line with the geological meaning of exploration operations discussed in

⁸⁷ Article 29(1) of the Petroleum Law No 21/2014 of Mozambique.

⁸⁸ Section 29(1) of the Petroleum Act.

⁸⁹ Section 1 of the Petroleum Act, *sv* “exploration operations”.

⁹⁰ Section 5(2) of the MPRD Act.

⁹¹ Badenhorst, Mostert and Dendy (note 29) at par 137.

Chapter Two.⁹² Under the MPRD Act, the definition of exploration operations contain four elements: First, it requires activities, which include re-processing of existing seismic data, acquisition and processing of new seismic data or other related activities. Second, these activities must be conducted with the very specific purpose of defining a trap. Third, the trap must be tested by drilling, logging and testing (including extended well testing) of a well. Finally such testing must occur with the intention of locating a discovery.

The MPRD Act does not limit exploration operations to the collection and processing of seismic data, but includes “other related activities”, provided that these activities are used to define a trap with the intention of locating a discovery.⁹³ The MPRD Act does not state what is meant by “other related activities”, but in general in the exploration phase, the holder of a right to explore for petroleum may use geological methods such as mapping, geological surveys and remote imaging analysis, geochemical methods such as water and soil testing, and geophysical methods such as gravity exploration, magnetic exploration and seismic studies in an attempt to locate a trap.⁹⁴

The holder of an exploration right furthermore has the exclusive right to remove and dispose of any petroleum samples found during the course of exploration.⁹⁵ However, the holder may only remove and dispose for his own account any petroleum found by him in the course of the exploration operations conducted pursuant to his exploration right in such quantities as may be required to conduct tests on it or to identify or analyse it.⁹⁶ The written permission of the Minister must be obtained to remove and dispose for the holder’s own account bulk samples of petroleum found by the holder in the course of exploration activities.⁹⁷

The holder of an exploration right furthermore has the exclusive right to apply for and be granted a production right in respect of the petroleum and the exploration right in

⁹² Under the MPRD Act, exploration operation means “...the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery”.

⁹³ Section 1 of the MPRD Act, *sv* “exploration operation”.

⁹⁴ See Chapter Two above.

⁹⁵ Section 82(1)(c) of the MPRD Act.

⁹⁶ Section 82(1)(c) read with section 20(1) of the MPRD Act.

⁹⁷ Section 82(1)(c) read with section 20(2) of the MPRD Act.

question.⁹⁸ This right may only be exercised if the holder has complied with certain provisions of the MPRD Act.⁹⁹

The holder of an exploration right is, moreover, not limited to conducting exploration operations. An exploration right holder may also carry on any other activity incidental to exploration operations, insofar as that activity does not contravene the MPRD Act.¹⁰⁰ So, for example, a holder may enter the exploration area together with his employees.¹⁰¹ The holder may also bring any plant, machinery, or equipment onto that land and may build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of exploration.¹⁰² Furthermore, the holder may also explore for his own account on or under that land petroleum for which the exploration right has been granted¹⁰³ and may remove and dispose of any such petroleum found in the course of exploration.¹⁰⁴

The holder of an exploration right may, subject to the National Water Act¹⁰⁵ and as required by the holder to conduct exploration operations, use water from any natural spring, lake, river or stream, situated on, or flowing through, the land in respect of which the exploration right is granted.¹⁰⁶ The holder may also, on the same terms, use water from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole.¹⁰⁷ The provisions of the National Water Act apply to the water management and pollution control at all proposed or existing exploration operations.¹⁰⁸ An assessment of impacts relating to

⁹⁸ Section 82(1)(a) of the MPRD Act.

⁹⁹ Section 82(1)(a) of the MPRD Act.

¹⁰⁰ Section 5(3)(e) of the MPRD Act.

¹⁰¹ Section 5(3)(a) of the MPRD Act.

¹⁰² Section 5(3)(a) of the MPRD Act.

¹⁰³ Section 5(3)(b) of the MPRD Act.

¹⁰⁴ Section 5(3)(c) of the MPRD Act. The MPRD Act does not specifically refer here to petroleum. Dale et al (note 9) at MPRDA-143 correctly state, however, that the omission is an absurdity.

¹⁰⁵ National Water Act 36 of 1998.

¹⁰⁶ Section 5(3)(d) of the MPRD Act.

¹⁰⁷ Section 5(3)(d) of the MPRD Act.

¹⁰⁸ Regulation 47(2) read with regulation 68(1) of the MPRD Regulations. The purpose of the National Water Act 36 of 1998 Act is stated in section 2 of the Act and is "...to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors (a) meeting the basic human needs of present and future generations; (b) promoting equitable access to water; (c) redressing the results of past racial and gender discrimination; (d) promoting the efficient, sustainable and beneficial use of water in the public interest; (e) facilitating social and economic development; (f) providing for growing demand for water use; (g) protecting aquatic and associated ecosystems and their

water management and pollution control at proposed exploration operations, where appropriate, must form part of the environmental management plan.¹⁰⁹

From the above, it is clear that the Petroleum Act in Namibia has a much broader understanding of what reconnaissance and exploration operations may entail, while the MPRD Act in South Africa is much more specific. The disadvantage of the Namibian approach is that it leaves scope for differences in interpretation between the regulator and petroleum companies, especially as regards the rights of the holder. Under the South African MPRD Act, the holder's rights are stipulated in much clearer terms, which is much more transparent and grants the holder better security of tenure.

3.3.1.2 Rights relating to production of petroleum

A production right is the only authorisation which allows the holder thereof to extract petroleum by means of production operations in South Africa. Its Namibian counterpart is a production licence.

The South African definition of production operations is similar to the Namibian understanding: it means any operation, activity or matter that relates to the exploration, appraisal, development and *production of petroleum*.¹¹⁰ The MPRD Act and the Petroleum Act are unclear as to what exactly constitutes *production of petroleum*. Under the MPRD Act, to “mine”, when used in respect of *minerals*, is the equivalent of the production activity.¹¹¹ To “mine” is defined in the MPRD Act as operations or activities conducted for the purposes of the winning of minerals.¹¹² Subsequently, the production of petroleum for purposes of the MPRD Act and the Petroleum Act can be understood as any operation or activity for the purposes of winning any petroleum.

A production licence holder in Namibia may exclusively carry on production operations on the block or blocks to which that licence relates, to sell or otherwise dispose of petroleum recovered within such block or blocks and to carry on such other operations

biological diversity; (h) reducing and preventing pollution and degradation of water resources; (i) meeting international obligations; (j) promoting dam safety; (k) managing floods and droughts.”

¹⁰⁹ Regulation 47(2) read with regulation 68(2) of the MPRD Regulations.

¹¹⁰ Section 1 of the Petroleum Act, *sv* “production operations”; section 1 of the MPRD Act, *sv* “production operation”.

¹¹¹ Dale et al (note 9) at MPRD-77 with reference to section 69(2)(b)(ii).

¹¹² Section 1 of the MPRD Act, *sv* “mine”. See also section 1 of the Namibian Minerals (Prospecting and Mining) Act 33 of 1992, *sv* “mine”, which contains a similar definition.

and works in or in connection with such block or blocks as may be necessary for or in connection with the operations and selling or disposal.¹¹³

The holder of a South African production right has the exclusive right to remove and dispose of any petroleum found during the course of production.¹¹⁴ Unlike an exploration right, no limit is placed on the amount of petroleum and the further consent of the Minister is not required. As with exploration rights, the holder of a production right is not limited to conducting production operations. A production right holder may also carry on any other activity incidental to production operations, insofar as that activity does not contravene the MPRD Act.¹¹⁵

Activities intended to produce or win petroleum are not exploration operations but rather production operations. At first sight this seems unproblematic, but the recent application by Royal Dutch Shell for exploration rights in the Karoo proves otherwise.¹¹⁶ As part of their exploration activities, Shell stated in its application that it may intend to employ hydraulic fracturing techniques during their operations. However, a proper understanding of the nature of hydraulic fracturing shows that these activities are production activities as they are aimed at winning petroleum and not locating a trap.¹¹⁷ An exploration right is therefore not sufficient to authorise the holder thereof to conduct hydraulic fracturing. Hydraulic fracturing is a process that is clearly

¹¹³ Section 44(1) of the Petroleum Act.

¹¹⁴ Section 86(1)(b) of the MPRD Act.

¹¹⁵ Section 5(3)(e) of the MPRD Act. So, for example, a holder may enter the exploration or production area together with his employees. The holder may also bring any plant, machinery, or equipment onto that land and may build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of production. Furthermore, the holder may also produce for his own account on or under that land petroleum for which the production right has been granted and may remove and dispose of any such petroleum found in the course of production. The holder of a production right may, subject to the National Water Act 36 of 1998 and as required by the holder to conduct production operations, use water from any natural spring, lake, river or stream, situated on, or flowing through, the land in respect of which the production right is granted. The holder may also, on the same terms, use water from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole. The provisions of the National Water Act apply to the water management and pollution control at all proposed or existing exploration or production operations. An assessment of impacts relating to water management and pollution control at proposed exploration or production operations, where appropriate, must form part of the environmental management plan. See sections 5(3)(a) – (d) and section 47(2) of the MPRD Act, read with regulation 68(1) of the MPRD Regulations. The MPRD Act does not specifically refer here to petroleum. Dale et al (note 9) at MPRDA-143 correctly state, however, that the omission is an absurdity.

¹¹⁶ See Chapter One above.

¹¹⁷ See Chapter Two above.

aimed at winning petroleum, and not exploring for petroleum. Any person who wishes to employ hydraulic fracturing will therefore only be able to do so under a production right and not under an exploration rights.¹¹⁸

3.3.1.3 Rights relating to co-operation

The Namibian Petroleum Act does not provide for any authorisation in respect of technical co-operation. In South Africa, a technical co-operation permit, unlike the other authorisations, is not aimed at searching for and extracting petroleum, but to enable the holder thereof to co-operate with the designated agency, Petroleum Agency of SA, to conduct a technical study of the available data and information relating to petroleum in respect of a relevant area.¹¹⁹ The MPRD Act does not define what is meant by “technical co-operation”. Dale *et al* presumes that the purpose behind technical co-operation is that the holder of such a permit will co-operate with the designated agency, Petroleum Agency of SA, to conduct a technical study of the available data and information relating to petroleum in respect of a relevant area.¹²⁰ The holder of a technical co-operation permit has the exclusive right to apply for and be granted an exploration right in respect of the area to which the permit relates.¹²¹ Notwithstanding its expiry date, a technical co-operation permit in respect of which an application for an exploration right has been lodged, shall remain in force until the exploration right has been granted or refused.¹²²

3.3.2 Life span / Duration of rights

The MPRD Act envisages that reconnaissance permits and technical co-operation permits are valid for a maximum period of one year, are exclusive, renewable or transferable and are subject to the prescribed terms and conditions.¹²³ The terms and conditions agreed upon in respect of a reconnaissance permit must be approved by the

¹¹⁸ See also Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 19-20.

¹¹⁹ Dale *et al* (note 9) at MPRDA-503.

¹²⁰ Dale *et al* (note 9) at MPRDA-503. On the website of Petroleum Agency of SA, a technical co-operation permit is defined as “[a] permit issued to applicant in terms of section 77(1) of MPRDA which allows the applicant to do desktop study, acquire seismic data from other sources including the Agency, etc; but does not include any prospecting or exploration activities.”

¹²¹ Section 78(1) of the MPRD Act.

¹²² Section 79(5) of the MPRD Act.

¹²³ Section 75(4)(a) – (e) and section 77(4)(a) – (d) of the MPRD Act.

Minister.¹²⁴ The short period for which the permit is granted may be justified by the nature of the activities authorised by the permit, which include only surveying.

An exploration right is valid for the period specified in the right, subject to a maximum of three years.¹²⁵ A production right is valid for the period specified in the right, subject to a maximum of 30 years.¹²⁶ Both are subject to the prescribed terms and conditions.¹²⁷ Terms and conditions further agreed upon must be approved by the Minister.¹²⁸

Both the Petroleum Act and the MPRD Act clearly state the duration of rights to petroleum. This promotes transparency and provides better security of tenure for investors. A Namibian reconnaissance licence is valid for a maximum period of two years, although the Minister may determine a shorter period.¹²⁹ Unlike its South African counterpart, a Namibian reconnaissance licence may be renewed. A production licence is valid for such period as may be determined by the Minister at the time of the granting of such licence, but may not exceed 25 years.¹³⁰ An exploration licence is valid for an initial maximum period of four years, although the Minister may grant it for a shorter period.¹³¹ The Minister may, upon application and upon good cause shown, extend this period to an initial maximum period of five years.¹³²

3.3.3 Application Procedures

Certainty in the application procedures for rights to petroleum is an important feature of transparent petroleum legislation. Prospective investors need to have a clear understanding of how to acquire rights in respect of petroleum to gain access to these resources. A transparent petroleum legislative framework must set out in certainty the application procedures that must be followed.

The application procedures for rights to petroleum are regulated by the specific principles set out in the MPRD Act and the Petroleum Act, and are subject to the more

¹²⁴ Regulation 19 of the MPRD Regulations.

¹²⁵ Section 80(5) of the MPRD Act.

¹²⁶ Section 84(4) of the MPRD Act.

¹²⁷ Section 80(5) and section 84(4) of the MPRD Act.

¹²⁸ Regulation 29 and regulation 35 of the MPRD Regulations.

¹²⁹ Section 23(1)(a) of the Petroleum Act.

¹³⁰ Section 45(1)(a) of the Petroleum Act.

¹³¹ Section 30(1) and section 30(2) of the Petroleum Act.

¹³² Section 30(2A) of the Petroleum Act.

general principles of just administrative action. As regulator, the state must comply with both the specific legislation and the general principles when dealing with applications for rights to petroleum. The following discussion deals with how certainty and stability is achieved through the legislative processes governing the application for and award of rights, the requirements of the rights awarded, and the procedure for renewals. The application procedures set out below do not, however, operate in isolation but against the backdrop of procedural fairness as a key element of just administrative action. This aspect is covered in Chapter Nine below.

3.3.3.1 Submission of Applications

In South Africa, application for a reconnaissance permit, technical co-operation permit, exploration right and production right must be submitted to Petroleum Agency of SA As the designated agency.¹³³ The MPRD Regulations prescribe the content of the application.¹³⁴ In Namibia application for a reconnaissance, exploration or production licence is made to the Petroleum Commissioner¹³⁵ in accordance with the provisions of the Petroleum Act.¹³⁶ Both jurisdictions require the application to be accompanied by a prescribed fee.¹³⁷ Under the Petroleum Act, the Commissioner must determine the form of the application.¹³⁸ Under the MPRD Act, the application must contain a work programme, which must contain the prescribed information and which will form part of the permit or right if it is granted.¹³⁹

¹³³ Section 74(1)(a) and (b), section 76(1)(a) and (b), section 79(1)(a) and (b) and section 83(1)(a) of the MPRD Act.

¹³⁴ Application for a reconnaissance permit must be made on Form K contained in Annexure I to the MPRD Regulations. Regulation 18 of the MPRD Regulations lists the detail that must be included in the application. Application for a technical co-operation permit must be made on Form L contained in Annexure I of the MPRD Regulations. Regulation 23(2) prescribes the information that must be contained in the application. Application for an exploration right must be made on Form M contained in Annexure I of the MPRD Regulations. Regulation 28 of the MPRD Regulations set out in detail what the application must contain. Application for a production right must be made on Form N contained in Annexure I of the MPRD Regulations. Regulation 34 of the MPRD Regulations prescribes the content of the application.

¹³⁵ Section 11(1)(a) of the Petroleum Act.

¹³⁶ Section 11 of the Petroleum Act. Section 24 prescribes the content of an application for a reconnaissance licence, while section 32 and section 46 prescribes the content of applications for exploration and production licences respectively.

¹³⁷ Section 11(1) of the Petroleum Act and section 74(1)(c), section 76(1)(c), section 79(1)(c) and section 83(1)(b) of the MPRD Act.

¹³⁸ Section 11(1) of the Petroleum Act.

¹³⁹ Regulation 18(2)(g), regulation 20, regulation 23(2)(g), regulation 25, regulation 28(2)(i), regulation 30, regulation 34(2)(h) and regulation 36 of the MPRD Regulations.

Under the Namibian Petroleum Act, a natural person or company may apply for a reconnaissance licence, while only a company may apply for an exploration or production licence.¹⁴⁰ The MPRD Act in South Africa does not state who may apply for a right or permit to petroleum. Typically, however, only companies apply for rights to petroleum.

The MPRD Act states that the Petroleum Agency SA must accept the application within 14 days of receipt if the prescribed requirements are met, no other person holds a right to petroleum over the same area and no prior application for any an exploration right, production right or technical co-operation permit has been accepted in respect of the same resource, land and area.¹⁴¹ If the application does not comply with the requirements, Petroleum Agency SA must notify the applicant in writing within 14 days of the receipt of the application. In line with the principles of just administrative action discussed in Chapter Nine below, the MPRD Act requires that the notification must be accompanied by written reasons.¹⁴² The MPRD Act is clear when Petroleum Agency SA must accept or refuse an application. Where the application is defective, the designated agency does not have discretion to accept the application, but must inform the applicant that it is defective.¹⁴³

The Namibian legislation does not provide for an agency such as the South African Petroleum Agency SA to deal with applications before a decision is made by the relevant Minister. The National Petroleum Corporation of Namibia (Pty) Ltd (“Namcor”) – the state-owned petroleum company – does not have delegated authority to receive and advise on applications for rights to petroleum. Despite this, the Petroleum Act include under the functions of Namcor assisting the Petroleum Commission on his request in the exercise by him of his functions, powers and duties under the Petroleum Act.¹⁴⁴

In Namibia, the Minister may, at any time after an application for a petroleum licence has been received, require the applicant to furnish the Minister with further information

¹⁴⁰ Section 10 of the Petroleum Act.

¹⁴¹ Section 74(2), section 76(2), section 79(2) and section 83(2) of the MPRD Act.

¹⁴² Section 74(3), section 76(3), section 79(3) and section 83(3) of the MPRD Act.

¹⁴³ See Chapter Nine below for a discussion of whether the applicant has an opportunity to remedy the application.

¹⁴⁴ Section 8(1)(d) of the Petroleum Act.

that the Minister may in his discretion deem necessary for purposes of considering the application.¹⁴⁵ This may include information relating to the controlling interest in the affairs of the company.¹⁴⁶ The Minister may also require the applicant to publish certain particulars of the application,¹⁴⁷ a function that has to date not been exercised. The Minister may also require the applicant to furnish certain information about the application to any other persons specified by the Minister.¹⁴⁸ The furnishing of further information is left up to the discretion of the Minister. The Minister may cause such investigations or negotiations to be made or undertaken as the Minister in his discretion deem necessary to enable him to consider any application for a petroleum licence or the renewal of a petroleum licence.¹⁴⁹ The Minister may, in order for him to be able to consider the application for a petroleum licence or renewal of a petroleum licence, require the applicant in writing to carry out or cause to be carried out such environmental impact studies as may be specified in the notice¹⁵⁰ or to furnish the Minister with such proposals, by way of alteration to or in addition to proposals set out in the application as may be specified by the Minister.¹⁵¹ Further investigations and negotiations are also left to the discretion of the Minister. Similar provisions are not provided for in South Africa.

The MPRD Act sets out a standard set of requirements for all applications for authorisations in respect of petroleum. First, the applicant must have access to financial resources and the technical ability to conduct the proposed operations.¹⁵² This is an important requirement, as it curbs the possibility of front or shell companies that do not have the necessary financial capability of exploring for and producing petroleum from applying for a petroleum right.¹⁵³ Secondly, the estimated expenditure must be compatible with the intended operations and the intended duration of the

¹⁴⁵ Section 12(1)(a)(ii) of the Petroleum Act.

¹⁴⁶ Section 12(1)(a)(i) of the Petroleum Act.

¹⁴⁷ Section 12(1)(b) of the Petroleum Act.

¹⁴⁸ Section 12(1)(c) of the Petroleum Act.

¹⁴⁹ Section 12(2)(a) of the Petroleum Act.

¹⁵⁰ Section 12(2)(b)(i) of the Petroleum Act.

¹⁵¹ Section 12(2)(b)(ii) of the Petroleum Act.

¹⁵² Section 75(1)(a), section 77(1)(a), section 80(1)(a) and section 84(1)(a) of the MPRD Act.

¹⁵³ See for example Hopwood G *Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploration* (2013) Windhoek Institute for Public Policy Research at 14. See also Onorato (note 37) at 12.

reconnaissance, technical co-operation, exploration or production program.¹⁵⁴ Third, the applicant must not be in contravention of any provision of the MPRD Act.¹⁵⁵

Aside from the standard requirements set out above, further specific requirements are set out for reconnaissance permits, exploration rights and production rights. Some apply to all three authorisations, while others apply only to one or two of the authorisations. The reason for this is that these rights are more invasive and may have environmental consequences as well and therefore require additional regulation. The first of these additional requirements is that, in respect of reconnaissance permits and production rights, the reconnaissance operations and production operations must not result in unacceptable pollution, ecological degradation or damage to the environment.¹⁵⁶ In respect of applications for exploration rights, the Minister must have issued an environmental authorisation.¹⁵⁷ The second of these additional requirements is that the applicant must have the ability to comply with the relevant provisions of the Mine Health and Safety Act.¹⁵⁸

In respect of applications for exploration rights, the third additional requirement is that the applicant must have complied with the terms and conditions of the technical co-operation permit (if applicable).¹⁵⁹ In respect of applications for production rights, the third additional requirement is that the applicant must have complied with the terms and conditions of the exploration right, if applicable.¹⁶⁰ Fourth, the granting of the exploration or production right must promote employment and advance the social and economic welfare of all South Africans.¹⁶¹ Fifth, the granting of the exploration or production right must substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into

¹⁵⁴ Section 75(1)(b), section 77(1)(b), section 80(1)(b) and section 84(1)(b) of the MPRD Act.

¹⁵⁵ Section 75(1)(e), 77(1)(c), section 80(1)(e) and section 84(1)(e) of the MPRD Act.

¹⁵⁶ Section 75(1)(c) of the MPRD Act. This section is substituted by section 54 of the Mineral and Petroleum Resources Amendment Act 49 of 2008, which reads as follows: “the reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment and that the environmental authorisation is issued.” This amendment will come into operation on 07 December 2014. See also section 84(1)(c) in respect of applications for production rights.

¹⁵⁷ Section 80(1)(c) of the MPRD Act.

¹⁵⁸ Act 29 of 1996. Section 75(1)(d), section 80(1)(d) and section 84(1)(d) of the MPRD Act.

¹⁵⁹ Section 80(1)(f) of the MPRD Act.

¹⁶⁰ Section 84(1)(f) of the MPRD Act.

¹⁶¹ Section 80(1)(g) read with section 2(f) and section 84(1)(i) read with section 2(f) of the MPRD Act.

and participate actively in the petroleum industry and to benefit from the exploitation of the nation's petroleum resources.¹⁶² With regard to this last requirement and in respect of applications for exploration rights only, the Minister may, having regard to the type of petroleum resource concerned and the extent of the exploration project, specifically request that the applicant gives effect to this requirement.¹⁶³

Two further additional requirements must be met in respect of applications for production rights. The sixth requirement is that the applicant must have provided financially and otherwise for a prescribed social and labour plan.¹⁶⁴ Finally, the petroleum must be capable of being produced optimally in accordance with the production work programme.¹⁶⁵

In Namibia, an applicant for a production licence must also submit details of its technical and financial ability, including its experience in the petroleum industry, as is the case in South Africa.¹⁶⁶ This is an important requirement, but one that appears not to have been applied strictly in practice. In a recent statement to the public, the Petroleum Commissioner has indicated that "government patience was running short" as petroleum companies seem to be struggling to raise finances for exploration and drilling and threatened not to renew licences for this reason.¹⁶⁷ This situation could have been prevented if the requirements set out in the Petroleum Act in respect of petroleum licences were applied strictly.

The Petroleum Act of Namibia furthermore states that if application is made for a production licence by the holder of an exploration licence, any part of the exploration area in respect of which the production licence is issued ceases to be part of the exploration area when the production licence is issued.¹⁶⁸ Although it is not expressly stated, the implication is that the remainder of the exploration area shall remain in force and the holder of the exploration licence may continue to exercise its rights in terms of

¹⁶² Section 80(1)(g) read with section 2(d) and section 84(1)(i) read with section 2(d) of the MPRD Act.

¹⁶³ Section 80(2) of the MPRD Act.

¹⁶⁴ Section 84(1)(g) of the MPRD Act.

¹⁶⁵ Section 84(1)(h) of the MPRD Act.

¹⁶⁶ Section 46(2)(b) of the Petroleum Act.

¹⁶⁷ Staff Reporter "Oil and Gas" *Insight: Mining in Namibia* (2014) at 12.

¹⁶⁸ Section 48 of the Petroleum Act.

the exploration licence over the remaining area. No similar provision exists under the MPRD Act.

From the above, it is clear that in Namibia under the Petroleum Act the Minister has much more discretion when it comes to requiring further information and granting or refusing and granting or refusing applications for petroleum licences than in South Africa. The MPRD Act goes to great lengths to limit the discretion of the Minister in respect of applications for rights to petroleum. The South African situation is therefore much more transparent than its Namibian counterpart. Not only does this provide greater security of tenure for the applicant, but it also promotes accountability.¹⁶⁹

3.3.3.2 Consultations with Interested and Affected Parties

In South Africa, Petroleum Agency SA must, within 14 days after accepting an application for an exploration or production right, call on interested and affected persons to submit comments on the application.¹⁷⁰ These comments must be submitted within 30 days from the date of the notice.¹⁷¹ If any person objects to the granting of the right, the Regional Manager must refer the objections to the Regional Mining Development and Environment Committee¹⁷² to consider the objections and to advise the Minister.¹⁷³ This is a very important step in the application procedure, as it gives persons affected by the application an opportunity to be heard, therefore giving additional protection to the interests of the people.¹⁷⁴

There is no provision made for consultations with interested and affected parties in the Namibian legislation. This is contrary to a regulatory regime that seeks to protect the

¹⁶⁹ For example, under South African law if an applicant whose application was refused takes the Minister on review, he can rely on various review grounds in the light of the strict requirements imposed in terms of the MPRD Act. Under the Namibian law, since so much is left to the discretion of the Minister, the applicant may have a harder time convincing a court to grant the application.

¹⁷⁰ Section 10(1)(b) of the MPRD Act.

¹⁷¹ Section 10(1)(b) of the MPRD Act.

¹⁷² This Committee also has functions in respect of petroleum. See Dale et al at MPRDA-531.

¹⁷³ Section 10(2) of the MPRD Act.

¹⁷⁴ See the discussion in Chapter Five at 4.1.3.5. above.

interests of citizens as well. It is vital for accountability that the broader public have a role to play in the exploitation of natural resources.¹⁷⁵

3.3.3.3 Evaluating Applications

The MPRD Act does not state within what time period Petroleum Agency SA must accept the application. In the light of the obligation placed upon administrators to make a decision within a reasonable time,¹⁷⁶ Petroleum Agency SA may not take an unreasonable time to accept the application.

Petroleum Agency SA must evaluate the application and make recommendations to the Minister.¹⁷⁷ The application is then considered by the Minister of Mineral Resources. The Minister must issue the permit or licence if certain requirements are met.¹⁷⁸ The least amount of requirements are set for technical co-operation permits, while applications for production rights have the most requirements. The requirements therefore depend on the type of authorisation applied for. Once again, the discretion of the decision-maker is limited – if the application applies with the prescribed requirements, the Minister must issue the permit or licence. On the other hand, the Minister must refuse the application if the application does not meet all these requirements as applicable to the relevant right in respect of petroleum.¹⁷⁹ Where application was made for a production right and all the requirements have not been met, the Minister must, within sixty days after receipt of the application, refuse to grant the application.¹⁸⁰ Similar time-periods are not set in respect of applications for any other permit or right. In terms of the principles of just administrative action, a decision must, however, be taken in a reasonable time, failing which the applicant will have a basis for an action of based on just administrative action.¹⁸¹ If the Minister refuses the application for any of the rights, he must within 30 days of the decision, in writing

¹⁷⁵ Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 41 – 42.

¹⁷⁶ Section 6(1) of the MPRD Act. See also Chapter Five above, at 4.1.3.1.

¹⁷⁷ Section 71(c) of the MPRD Act.

¹⁷⁸ Section 75(1), section 77(1), section 80(1) and section 84(1) of the MPRD Act.

¹⁷⁹ Section 75(2), section 77(2), section 80(3) and section 84(2) of the MPRD Act.

¹⁸⁰ Section 84(2) of the MPRD Act.

¹⁸¹ See section 6(1) of the MPRD Act. See Chapter Nine below for a discussion of whether the applicant has a right to remedy the application.

notify the application of the decision. The notification must be accompanied by reasons for the decision.¹⁸²

In Namibia, a petroleum licence may only be granted over a block or blocks in respect of which, at the time that the application for the licence is made, no other petroleum licence has been issued to any other person.¹⁸³ Interestingly, the Minister in Namibia has a discretion whether to grant the licence, unlike South Africa where he is obliged to grant the application if all the requirements are met. The Minister may also refuse to grant the application for the petroleum licence.¹⁸⁴ When considering an application for a petroleum licence or the renewal of a petroleum licence, the Minister must take into account the need to conserve and protect natural resources in or on the block or block to which the application related and in or on adjoining or neighbouring land.¹⁸⁵ If the Minister is prepared to grant the application for a petroleum licence, he must direct that notice be given to the applicant in which the terms and conditions (in addition to the standard terms and conditions discussed below) are set out in which he is prepared to grant the application.¹⁸⁶ The applicant then has sixty days to agree to the terms and condition or such other terms and conditions as may be agreed upon,¹⁸⁷ failing which the application will lapse.¹⁸⁸ The Minister may, subject to the provisions of the Petroleum Act, grant a petroleum licence on such terms and conditions as may be determined by him.¹⁸⁹ Here, the Minister has discretion as to what conditions may be attached to a licence. The decision to attach conditions, and the conditions themselves, must comply with the principles of just administrative action.¹⁹⁰ The Petroleum Act is, however, not transparent in respect of what conditions may be attached.

Once again, the above discussion shows that in South Africa the powers of the Minister in respect of evaluating applications are restricted, while in Namibia the Minister has

¹⁸² Section 75(3), section 77(3), section 80(4) and section 84(3) of the MPRD Act.

¹⁸³ Section 22(2) of the Petroleum Act.

¹⁸⁴ Section 11(2) of the Petroleum Act.

¹⁸⁵ Section 12(3) of the Petroleum Act.

¹⁸⁶ Section 12(4)(a) of the Petroleum Act.

¹⁸⁷ Section 12(4)(b) of the Petroleum Act. The sixty days may, on good cause shown, be extended by the Minister.

¹⁸⁸ Section 12(5) of the Petroleum Act.

¹⁸⁹ Section 11(2) of the Petroleum Act.

¹⁹⁰ See Chapter Five above at 4.1.3.

much more discretion. This is not conducive to a transparent regulatory framework for petroleum resources.

3.3.3.4 Petroleum Agreements

Onorato identifies model petroleum contracts as one of the essential elements of a petroleum law. The main tenets of this agreement should be provided for within the relevant petroleum act in order to give it a legislative basis. There should, however, be sufficient scope for negotiations to ensure that the contract is flexible.¹⁹¹

One of the major differences between South Africa and Namibia is the requirement under Namibian law to enter into a petroleum agreement. Before an exploration licence is issued, the Minister must enter into a petroleum agreement with the holders concerned. If a production licence is issued to a holder who does not hold an exploration licence, the Minister must enter into a petroleum agreement with the holders concerned. If the applicant for a production licence already holds an exploration licence, it is not necessary under the Petroleum Act to enter into a second agreement.¹⁹² However, the Petroleum Act provides for additional discretionary terms and conditions in respect of production operations which may not have been included when the agreement was negotiated and entered into in respect of the exploration licence. To accommodate for this, the Ministry of Mines and Energy in 1998 published a model petroleum agreement (“MPA”) which is normally used in practice, subject to negotiations between the parties.¹⁹³ An updated MPA was published in 2007.¹⁹⁴ This agreement deals extensively with exploration and production operations. The MPA contains terms relating to exploration operations and terms and conditions that will apply when the holder applies for and is issued a production licence. The MPA is therefore a combination agreement that applies to both holders of exploration and production licences.

¹⁹¹ Onorato (note 37) at 10.

¹⁹² Section 13(1) of the Petroleum Act.

¹⁹³ This agreement is available at Ministry of Mines and Energy “Model Petroleum Agreement” available at http://www.mme.gov.na/pdf/model_petroleum_agreement_1998.pdf [accessed 02.02.2014].

¹⁹⁴ This agreement is available at Ministry of Mines and Energy “Model Petroleum Agreement 2007” available at [http://www.mme.gov.na/energy/pdf/MODEL%20PETROLEUM%20AGREEMENT 2007.doc](http://www.mme.gov.na/energy/pdf/MODEL%20PETROLEUM%20AGREEMENT%202007.doc) [accessed on 02.02.2014].

The Petroleum Act specifically refers to a petroleum agreement, giving it legislative recognition, but the MPA is not incorporated as part of the Petroleum Act, thus ensuring room for negotiation. The petroleum agreement that a holder must enter into may not be in conflict with the provisions of the Petroleum Act. Any provisions inconsistent with the Petroleum Act are deemed to be of no force and effect.¹⁹⁵ The petroleum agreement must contain the terms and condition on which the Minister is prepared to grant the licence.¹⁹⁶ It must furthermore contain the terms and conditions relating to the basis on which the market value of petroleum may from time to time be determine.¹⁹⁷

The petroleum agreement may also contain certain discretionary conditions, subject to agreement between the parties. These conditions relate to the name of the holder, particulars of its incorporation and registration as company, the registered address, the names and nationality of the directors, the capital and the name of any person who is the beneficial holder of more than 5% of the shares issued by the company.¹⁹⁸ It may also contain terms and conditions relating to the mining exploration operations to be carried out and the time-table for these operations, as well as the minimum expenditure in respect of the operations.¹⁹⁹ The formation of joint ventures or other joint arrangements, including profit-sharing by the state may also be included,²⁰⁰ as well as the participation, including the acquisition of equity share capital, by the state, Namcor or any other person in any ventures or arrangements entered into with the holder.²⁰¹

In the case of profit sharing by the state, the agreement may also contain terms and conditions relating to the basis upon which the holder of a production licence may be exempted, wholly or partly, from any provision of the Petroleum (Taxation) Act²⁰² or any other law governing income tax.²⁰³ Other discretionary terms relate to the manner in which exploration operations must be carried out, guarantees to ensure the due and

¹⁹⁵ Section 13(1) and section 13(4) of the Act.

¹⁹⁶ Section 13(1) read with section 12(4) of the Petroleum Act.

¹⁹⁷ Section 13(2) of the Petroleum Act.

¹⁹⁸ Section 13(2)(a) of the Petroleum Act.

¹⁹⁹ Section 13(2)(b) and (c) of the Petroleum Act.

²⁰⁰ Section 13(2)(d) of the Petroleum Act.

²⁰¹ Section 13(2)(e) of the Petroleum Act.

²⁰² Act 3 of 1991.

²⁰³ Section 13(2)(e) of the Petroleum Act.

proper performance by the holder of its obligations and arbitration in the event of a dispute.²⁰⁴ Finally, the agreement may contain terms and conditions relating to the co-ordination of operations for the recovery of petroleum carried out or to be carried out in any neighbouring production area in which part of the petroleum reservoir to which the production licence relates is situated.²⁰⁵ Nothing contained in the agreement may be construed as absolving any party thereto from any requirement laid down by law or from applying for, and obtaining, any permit, licence, approval, permission or other document required by law.²⁰⁶

3.3.3.5 Renewals

In South Africa, the holder of an exploration right or production right has the exclusive right to apply for and be granted a renewal of the right in respect of petroleum and the area in question.²⁰⁷ Application for renewal must be lodged with Petroleum Agency SA in the prescribed manner and must be accompanied by the prescribed, non-refundable application fee.²⁰⁸ Application for renewal must state the reasons for renewal and the period for which the renewal is required.²⁰⁹ It must also be accompanied by a detailed report reflecting the exploration or production results, the interpretation thereof and the exploration and production expenditure incurred.²¹⁰ The application for renewal must be accompanied by a report reflecting the extent of compliance with the requirements of the approved environmental management programme, the rehabilitation to be

²⁰⁴ Section 13(2)(f), (g) and (h) of the Petroleum Act.

²⁰⁵ Section 13(2)(j) of the Petroleum Act.

²⁰⁶ Section 13(5) of the Act.

²⁰⁷ Section 82(1)(b) and section 86(1)(a) of the MPRD Act.

²⁰⁸ Section 81(1)(a) to (c) and section 85(1)(a) to (c) of the MPRD Act. Application for renewal of an exploration right is lodged on Form M contained in Annexure I of the MPRD Regulations. Regulation 33 of the MPRD Regulations contains the prescribed information that the application must contain. Application for renewal of a production right is lodged on Form N contained in Annexure I of the MPRD Regulations. Regulation 38 of the MPRD Regulations contains the prescribed information that the application must contain.

²⁰⁹ Section 81(2)(a) and section 85(2)(a) of the MPRD Act.

²¹⁰ Section 81(2)(b) and section 85(2)(b) of the MPRD Act.

completed and the estimated cost thereof.²¹¹ Finally, the application for renewal must include a detailed work programme for the renewal period.²¹²

The Minister must grant the application for renewal if the application complies with the requirements for renewal applications set out above and the holder thereof has complied with the work programme, the requirements of the approved environmental management programme, the social and labour plans (where application is for renewal of a production right), the terms and conditions of the exploration or production right and is not in contravention of any relevant provision of the MPRD Act or any other law.²¹³ Once again, the discretion of the Minister is limited here. If the application for renewal complies with all the requirements, the Minister must grant the application.

An exploration right may only be renewed for a maximum of three periods not exceeding two years per period.²¹⁴ The maximum period that an exploration right may be granted for is therefore nine years. A production right is valid for a maximum period of 30 years and may be renewed for further periods of 30 years.²¹⁵ An exploration or production right in respect of which an application for renewal has been filed shall, notwithstanding its expiry date, remain in force until such time as the application for renewal has been granted or refused.²¹⁶

In Namibia, application for the renewal of any petroleum licence must be made in the prescribed manner.²¹⁷ A petroleum licence in respect of which an application for renewal is filed will not, despite its expiry date, expire until the application for renewal is refused or withdrawn or has lapsed, whichever occurs first.²¹⁸

²¹¹ Section 81(2)(c) of the MPRD Act. Section 81(2)(c) is substituted by section 59(a) of the Mineral and Petroleum Resources Development Amendment Act, which reads as follows: “be accompanied by a report reflecting the extent of compliance with conditions of the environmental authorisation”. This amendment shall come into operation on 07 December 2014. With regard to renewal of production licences, see section 85(2)(c) of the MPRD Act.

²¹² Section 81(2)(d) and section 85(2)(d) of the MPRD Act.

²¹³ Section 81(3) and section 85(3) of the MPRD Act.

²¹⁴ Section 82(4) of the MPRD Act.

²¹⁵ Section 85(4) of the MPRD Act.

²¹⁶ Section 82(5) and section 85(5) of the MPRD Act.

²¹⁷ Sections 25, 33 and 49 of the Petroleum Act.

²¹⁸ Sections 23(3), 30(3)(a) and 45(3) of the Petroleum Act.

Application for renewal of a reconnaissance or exploration licence has to be made 90 days prior to the expiry of the licence.²¹⁹ Application for the renewal of a production licence has to be made no later than one year before the expiry of the licence.²²⁰ In each case, the Minister may on good cause shown allow a shorter period within which application for renewal must be made, provided that no application for renewal may be filed after the licence has expired.²²¹

The Minister may not grant an application for the renewal of an exploration or production licence if, the holder of such licence is, at the time of the application, failing to comply with any term or condition subject to which the licence in question has been issued or with any provision of the Petroleum Act.²²² The same requirement is not stated in respect reconnaissance licences. The effect therefore is that the requirement for renewals for reconnaissance licences are much more relaxed – the renewal may be granted even if the holder is not complying with the terms and conditions of the licence or the Act. Although the discretion of the Minister appears to be limited here, the fact that he may not grant an application if all requirements are not met does not mean that he must grant the application if the requirements are met, as is provided for in South Africa under the MPRD Act.

The Minister may not refuse the application to renew an exploration or production licence unless written notice has been given to the holder of his intention to refuse the application. The notice must set out particulars of the alleged failure and must require the holder to make representations to the Minister in relation to the alleged failure or to remedy such failure on or before a date specified in such notice, and such holder has failed to so remedy such failure or make such representation.²²³ The same provision is not made in respect of reconnaissance licences. However, in the light of just administrative action (especially the right to be heard and the right to be given written reasons), the same should apply to applications for renewals of reconnaissance licences.²²⁴ The Minister still appears to have discretion to grant an application for

²¹⁹ Sections 25(a) and 33(1)(a) of the Petroleum Act.

²²⁰ Section 49(1)(a) of the Petroleum Act.

²²¹ Sections 25(a), 33(1)(a) and 49(1)(a) of the Petroleum Act.

²²² Section 33(3)(a) and section 49(3)(a) of the Petroleum Act.

²²³ Sections 33(3)(b) and 49(3)(b) of the Act.

²²⁴ See Chapter Six above.

renewal, although he is obliged, if he decides to exercise this discretion and refuse the application, to give notice to the applicant.

A reconnaissance licence may be renewed for further periods, not exceeding two years at a time.²²⁵ It may, however, only be renewed twice.²²⁶ The maximum period that a reconnaissance licence may therefore be issued (including renewals) is six years. An exploration licence may be renewed for two further periods of two years each, provided that it may not be renewed on more than two occasions.²²⁷ The Minister may, upon application and upon good cause shown, extend each two-year renewal period to a maximum of three years.²²⁸ A third renewal is, possible if the Minister of Mines and Energy deems it to be in the interest of the development of the petroleum of Namibia. A third renewal may not be for a period longer than two years,²²⁹ which two-year period may also on application and good cause shown, be extended by the Minister to a maximum of three years.²³⁰ The normal period that a licence is therefore valid is for a maximum of eight years. A third renewal is possible, which will extend the licence to a maximum of ten years. Upon application and good cause shown, this period can be extended further to a maximum of between eleven and fourteen years. No further extensions are possible in terms of the Petroleum Act. The holder of an exploration licence must, on renewal, be obliged to relinquish a certain portion of the exploration area.²³¹

A production licence may be renewed for such further period, not exceeding 10 years, as may be determined by the Minister at the time of the renewal of the licence.²³² The renewal period runs from the date on which such licence would have expired if an application for renewal had not been made or on the date on which the application for such renewal is granted, whichever date is the later date.²³³ A production licence may not be renewed on more than one occasion.²³⁴ The maximum duration of a production

²²⁵ Section 23(1) of the Petroleum Act.

²²⁶ Section 23(2) of the Petroleum Act.

²²⁷ Section 30(1) and section 30(2)(a) of the Petroleum Act.

²²⁸ Section 30(2A) of the Petroleum Act.

²²⁹ Section 30(2)(b) of the Petroleum Act.

²³⁰ Section 30(2A) of the Petroleum Act.

²³¹ Section 37 of the Petroleum Act.

²³² Section 45(1)(b) of the Petroleum Act.

²³³ Section 45(1)(b) of the Petroleum Act.

²³⁴ Section 45(2) of the Petroleum Act.

licence is therefore 35 years. A production licence does not expire during a period during which an application for the renewal of such licence is being considered until such application is refused or the application is withdrawn or has lapsed, whichever occurs first.²³⁵

3.3.3.6 Assessment of Application Procedures

The application procedures for rights to petroleum is regulated on the one hand by the specific principles set out in the MPRD Act and the Petroleum Act, and on the other hand by the more general principles of just administrative action, discussed in Chapter Nine. As regulator, the state must comply with both the specific legislation and the general principles when dealing with applications for rights to petroleum.

The MPRD Act clearly limits the discretion the Minister in respect of the granting of rights and permit and state that the Minister must grant an application if all requirements are met. In Namibia, the Minister appears to have discretion whether to grant an application for a petroleum licence, even if the requirements are met. In fact, the entire application procedure under the Petroleum Act appears to be dependent on the discretion of the Minister. This is not in line with a transparent petroleum regulatory regime. This unfortunate situation is remedied to a certain extent by the fact that the Minister, while he still has discretion, must exercise this discretion in line with the principles of just administrative action.²³⁶

3.3.4 Obligations of Holders

A transparent petroleum legislative framework must set out the obligations of holders prescribed by law.²³⁷ Holders also need to know whether there are obligations that may be imposed at the discretion of the regulator. It is furthermore to the benefit of the nation as a whole to know what obligations holders of rights in respect of petroleum may have and how they are imposed.

In South Africa, the obligations placed on holders of reconnaissance and technical co-operation permits are much less onerous than the obligations on holders of exploration

²³⁵ Section 45(3) of the Petroleum Act.

²³⁶ See Chapter Nine below.

²³⁷ Onorato (note 37) at 12.

and production rights. The same applies in Namibia, where stricter obligations are placed on holders of exploration and production licences than on holders of reconnaissance licences. The reason for this probably

The Namibian Petroleum Act contains certain standard terms and conditions that apply to all petroleum licences, as well as terms and conditions that apply to exploration and production licences specifically. So, for example is a standard terms and condition of all petroleum licences that the holder must, in the employment of employees, give preference to Namibian citizens who possess appropriate qualifications for purposes of the operations to be carried out in terms of the licence.²³⁸ The holder must also carry out training programmes to encourage and promote the development of Namibian citizens in the holder's employment.²³⁹ For this purpose, the Minister may enter into agreements with licence holders providing for the implementation of training programs and the contribution of moneys to the Petroleum Training and Education Fund.²⁴⁰ Furthermore, the holder of a petroleum licence must co-operate with other persons involved in the petroleum industry to enable these citizens to develop skills and technology to render services in the interest of the Namibian petroleum industry.²⁴¹ The holder must, after due regard being had to the need to ensure technical and economic efficiency, make use of products, equipment and services which are available in Namibia.²⁴² If any mineral is found during operations, this must be reported to the Minister as soon as possible.²⁴³

Aside from the standard conditions of a licence discussed above, the Petroleum Act also prescribes other terms and conditions of an exploration or production licence.²⁴⁴ Many of these terms and conditions relate to the environment²⁴⁵ and are discussed in more detail in the next chapter. Aside from these conditions relating to the

²³⁸ Section 14(1)(a) of the Petroleum Act.

²³⁹ Section 14(1)(b) of the Petroleum Act.

²⁴⁰ Section 14(2) of the Petroleum Act.

²⁴¹ Section 14(1)(c) of the Petroleum Act.

²⁴² Section 14(1)(d) of the Petroleum Act.

²⁴³ Section 14(1)(e) of the Petroleum Act.

²⁴⁴ Sections 38 and 53(1)(a) of the Petroleum Act. See Koep PF and Van den Berg HM "Mining and Energy Law in Namibia" in Ruppel OC and Ruppel-Schlichting K (eds) *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life*, (2013) Windhoek OrumbondePress.na & Welwitschia Verlag Dr. A. Eckl, Essen at 188–190.

²⁴⁵ Section 38(2) of the Petroleum Act.

environment, it is also a term and condition of an exploration or production licence that the holder thereof must carry out exploration or production operations in the exploration or production area in accordance with good oilfield practices.²⁴⁶ The holder must also take all reasonable steps necessary to secure the safety, welfare and health of persons employed for purposes of such operations in the exploration area.²⁴⁷

The holder of an exploration or production licence must maintain in good condition and repair all structures, equipment and other goods in the exploration area and used in connection with the exploration operations.²⁴⁸ All installations, equipment, pipelines and other facilities (whether onshore or offshore) not used or intended to be used in connection with the exploration operations must be removed by the holder or otherwise dealt with as directed by the Minister in consultation with the Minister of Environment, the Minister of Fisheries and Marine Resources and the Minister of Finance.²⁴⁹ Finally, the holder must take reasonable steps to warn persons who may from time to time be in the vicinity of any such structures, equipment or other goods of the possible hazards resulting therefrom.²⁵⁰ Any holder of a licence who contravenes or fails to comply with these obligations is guilty of an offence. On conviction, the holder may be liable to a maximum fine of N\$20,000.²⁵¹

Finally, specific conditions are imposed only on holders of production licences. The holder of a production licence must measure and weigh in accordance with a method approved, due regard being had to good oilfield practices, by the Commissioner, petroleum produced and saved from the area to which such holder's licence relates.²⁵² The holder must also cause all appliances used for purposes of weighing and measuring

²⁴⁶ Sections 38(1)(a) and 53(1) of the Petroleum Act. “Good Oilfield Practices” means “any practices which are generally applied by persons involved in the exploration or production of petroleum in other countries of the world as good, safe, efficient and necessary in the carrying out of exploration operations or production operations”. See Section 1 of the MPA and Section 1 of the Petroleum Act. See also Chapter Six, par 3.3.2.2. below for the criticism on “good oilfield practices”.

²⁴⁷ Sections 38(1)(b) and 53(1) of the Petroleum Act.

²⁴⁸ Sections 38(1)(c) and 53(1) of the Petroleum Act.

²⁴⁹ Sections 38(1)(d) and 53(1) of the Petroleum Act.

²⁵⁰ Sections 38(1)(e) and 53(1) of the Petroleum Act.

²⁵¹ Sections 38(3) and 53(1) of the Petroleum Act.

²⁵² Section 53(2)(a)(i) of the Petroleum Act.

to be tested and examined in accordance with any directions in writing issued by the Commissioner.²⁵³

The South African legislation does not contain a standard set of obligations, but instead lists specific obligations of each right holder. Under the MPRD Act, the holder of a reconnaissance permit is obliged to conduct reconnaissance operations actively in respect of petroleum on the relevant area and in accordance with the reconnaissance programme,²⁵⁴ while the holder of a technical co-operation permit must actively carry out the technical co-operation study in accordance with the technical co-operation work programme.²⁵⁵ Holders in respect of both permits must comply with the terms and conditions of the permit, the relevant provisions of the MPRD Act and any other law that may be applicable.²⁵⁶ Holders of reconnaissance permits must pay the prescribed reconnaissance fee to the designated agency.²⁵⁷ Holders of technical co-operation permits must submit the permit for recording in the Mineral and Petroleum Titles Registration Office.²⁵⁸ In Namibia, the standard conditions apply to reconnaissance licences, as well as exploration and production licences.

In South Africa, the MPRD Act lists various obligations of holders of exploration and production rights. First, the holder must lodge the right within 60 days for registration at the Mineral and Petroleum Titles Registration Office.²⁵⁹ Second, the holder must continuously and actively conduct exploration and production operations in accordance with the approved work programme.²⁶⁰ Third, the holder must comply with the terms and conditions of the right, the relevant provisions of the MPRD Act and any other law.²⁶¹ Fourth, the holder must comply with the requirements of the approved environmental management programme and, in the case of holders of production rights, the prescribed social and labour plan.²⁶² Two further obligations are prescribed for

²⁵³ Section 53(2)(a)(ii) of the Petroleum Act.

²⁵⁴ Section 74(5)(a) of the MPRD Act.

²⁵⁵ Section 78(2)(a) of the MPRD Act.

²⁵⁶ Section 75(5)(b)(c) and section 78(2)(b) of the MPRD Act.

²⁵⁷ Section 75(5)(b)(c) of the MPRD Act.

²⁵⁸ Section 78(2)(c) of the MPRD Act.

²⁵⁹ Section 82(2)(a) and section 86(2)(a) of the MPRD Act.

²⁶⁰ Section 82(2)(b) and section 86(2)(b) of the MPRD Act.

²⁶¹ Section 82(2)(c) and section 86(2)(c) of the MPRD Act.

²⁶² Section 82(2)(d) of the MPRD Act. With regard to production rights, see section 86(2)(d) of the MPRD Act. This subsection is substituted by section 64(b) of the Mineral and Petroleum

holders of exploration rights. Holders must pay the prescribed exploration fees to the designated agency²⁶³ and must commence with exploration activities within 90 days from the effective date of the exploration right or such extended period as the Minister may authorise.²⁶⁴

The holder of an exploration or production right in South Africa may only commence with the exploration or production operations when the holder has provided for a financial provision acceptable to the designated agency.²⁶⁵ This financial provision must guarantee the availability of sufficient funds for the due fulfilment of all exploration or production work programmes by the holder.²⁶⁶ A similar requirement is not imposed in Namibia under the Petroleum Act. The MPA does, however, contain various obligations on holder to submit proof of funding on the date of signing of the agreement.²⁶⁷

In Namibia, specific obligations are imposed on holders of exploration licences with regard to discoveries of petroleum. This is in line with general practice in respect of petroleum legislation.²⁶⁸ When a discovery of petroleum is made in an exploration area, the holder of the exploration licence concerned must immediately inform the Commissioner by notice in writing of the fact that such discovery has been made.²⁶⁹ The holder must then, within a period of sixty days after the notice, furnish the Commissioner in writing with particulars relating to the block or blocks where such discovery has been made, the nature of such discovery and such other particulars as the Commissioner may require.²⁷⁰

Immediately after a discovery of petroleum is made, the holder must cause tests to be made in connection with such discovery to determine the commercial interest of such

Resources Development Amendment Act 49 of 2008, which reads as follows: “comply with the conditions of the environmental authorisation and the prescribed social and labour plan”. This amendment shall come into operation on 07 December 2014.

²⁶³ Section 82(2)(e) of the MPRD Act.

²⁶⁴ Section 82(1)(c) of the MPRD Act.

²⁶⁵ Section 89 of the MPRD Act.

²⁶⁶ Section 89 of the MPRD Act.

²⁶⁷ See clause 4.7 of the MPA.

²⁶⁸ Onorato (note 37) at 49.

²⁶⁹ Section 39(1)(a) of the Petroleum Act.

²⁷⁰ Section 39(1)(a) of the Petroleum Act.

discovery.²⁷¹ Within a period of sixty days after having completed such tests, the holder must furnish the Commissioner with a report containing an evaluated result of such tests and an evaluation of the potential commercial interest of such discovery.²⁷² If it appears from the report that a discovery may be of a commercial interest, the holder of the licence must forthwith take all such steps as may be reasonable in the circumstances to appraise the discovery and determine the quantity of petroleum to which the discovery relates in so far as it occurs within the exploration area.²⁷³ After the appraisal has been completed, the holder must furnish the Commissioner with a report containing particulars of such appraisal and determination.²⁷⁴ The Minister may, on application by the holder, exempt the holder from appraising the discovery.²⁷⁵

At any time during the period referred to above, the Commissioner may require the holder of the exploration licence concerned by notice in writing addressed and delivered to such holder to furnish the Commissioner, within such period as may be specified in such notice in writing, with such particulars on any matter so specified concerning the discovery or any appraisal of such discovery.²⁷⁶ A holder who fails to comply with this notice is guilty of an offence and is on conviction liable to a maximum fine of N\$20,000.00.²⁷⁷

If it appears from the report submitted to the Commissioner by the holder that a discovery is not of potential commercial interest, the Minister may by notice in writing addressed and delivered to the holder, direct that with effect from a date specified in such notice the licence in question shall cease to be of any force and effect in relation to the discovery block in question and any adjoining land required for purposes of obtaining access to that block. The Minister must give this notice within 180 days as from the date on which such report was furnished.²⁷⁸ The Minister may not exercise this power unless: (1) he has by notice in writing informed the holder of his intention to exercise such powers. The notice must require the holder to make representations to

²⁷¹ Section 39(1)(b) of the Petroleum Act.

²⁷² Section 39(1)(b) of the Petroleum Act.

²⁷³ Section 39(2) of the Petroleum Act.

²⁷⁴ Section 39(2) of the Petroleum Act.

²⁷⁵ Section 39(3) of the Petroleum Act.

²⁷⁶ Section 40(1) of the Petroleum Act.

²⁷⁷ Section 40(2) of the Petroleum Act.

²⁷⁸ Section 41(1) of the Petroleum Act.

the Minister in relation to the matter on or before a date specified in such notice; and (2) he is, having regard to information available to him and after having considered any representations made to him by the holder, satisfied that the discovery is of not potential commercial interest.²⁷⁹

If it appears that a discovery is of a commercial interest, the Minister must, upon an application made to the Minister by the holder of the licence concerned, within a period of 90 days as from the date of such application declare by notice in the *Government Gazette* the discovery block and not more than eight other blocks specified in the application to be a petroleum field.²⁸⁰ The Minister may, upon an application made to him by the holder of the licence concerned declare by notice in the *Government Gazette* that the block specified in such application shall form part of or cease to form part of a petroleum field.²⁸¹ The holder of an exploration licence may not make any application to the Minister in respect of any block, unless such block adjoins²⁸² the discovery block and is situated within the exploration area of such holder.²⁸³ The Minister on the other hand may not declare any block to be a petroleum field or to form part of a petroleum field, unless such block contains a petroleum reservoir or part of a petroleum reservoir or adjoins any such block.²⁸⁴

When a petroleum field has been declared, the holder of the exploration licence issued in respect of the discovery block in question may, subject to the provisions of the Petroleum Act relating to production licences, apply within a period of two years as from the date on which the petroleum field has been so declared or such further period as the Minister may on good cause shown allow in writing during the currency of its licence, for a production licence in respect of such petroleum field.²⁸⁵ If the holder

²⁷⁹ Section 40(2) of the Petroleum Act. With regard to the second requirement, the Petroleum Act states that the Minister must be satisfied that the discovery is of potential commercial interest. This, however, appears to be a typing error, as the section deals with discoveries not of potential commercial interest.

²⁸⁰ Section 41(1) of the Petroleum Act.

²⁸¹ Section 41(2) of the Petroleum Act.

²⁸² For purposes of this section, a block shall be regarded to adjoin a discovery block or a block containing a petroleum reservoir or part of such reservoir, if any part of such first-mentioned block has a side in common or touches such discovery block or such other block. See section 41(5) of the Petroleum Act.

²⁸³ Section 41(3) of the Petroleum Act.

²⁸⁴ Section 41(4) of the Petroleum Act.

²⁸⁵ Section 43(1) of the Petroleum Act.

fails to apply for a production licence within the period so referred to informs the Minister by notice in writing within such period that he does not intend to apply for a production licence, the Minister may by notice in the *Government Gazette* withdraw the notice in terms of which such petroleum field is declared to be a petroleum field.²⁸⁶

If petroleum is not recovered in a production area and the Minister is satisfied that petroleum is recoverable in such, he may by written notice to the holder of the production licence concerned, direct the holder to take, due regard being had to good oilfield practices, such steps as may be necessary and practicable to recover petroleum in such area, as the Minister may specify in such notice.²⁸⁷ The same applies if petroleum is recovered at a rate which is, having regard to the capacity of the petroleum reservoir in such area, in the opinion of the Minister not in the public interest. In that case, the notice must require the holder to increase or reduce the rate at which the petroleum is recovered in such area to such rate, not exceeding, in the case of an increase, the capacity of the production facilities of the holder of the licence.²⁸⁸ Any holder of a production licence who contravenes or fails to comply with such a notice is guilty of an offence and on conviction liable to a fine not exceeding N\$100,000.²⁸⁹ This section ensures that the state is placed in a position to ensure the optimal exploitation of petroleum resources in Namibia.

The obligations imposed by the MPRD Act on the holder of a right or permit relate for the most part to administrative issues, such as lodgement for registration and payment of fees. Some obligations, however, may have a much wider effect on the operations of the holder, such as the obligation to comply with all relevant laws and the relevant work programmes. The Petroleum Act describes in much more detail the obligations of holders than the MPRD Act. Additional obligations may be imposed in terms of the petroleum agreement as well. These obligation relate to more than just administrative issues, but have an effect on the relevant activities as well, for example training, procurement, skills development, environmental issues, etc. The more detailed the obligations are, the more certainty the relevant legislative framework provides.

²⁸⁶ Section 43(2) of the Petroleum Act.

²⁸⁷ Section 52(1) of the Petroleum Act.

²⁸⁸ Section 52(1) of the Petroleum Act.

²⁸⁹ Section 52(2) of the Petroleum Act.

Under both Acts it appears as if the Minister may at his discretion impose conditions on holders that are not prescribed in the relevant statutes. This general authority of the Minister is, however, curbed by the principles of just administrative, discussed later.

The Petroleum Act sets out in detail what the obligations of a holder are when a discovery of petroleum is made, which the MPRD Act fails to do. Given the national importance of such a discovery, legislatures should consider providing in its legislation in detail for the role of the state in the event of a discovery. This is in line with the approach by other jurisdictions as well, such as Australia,²⁹⁰ Ghana²⁹¹ and Angola.²⁹²

3.3.5 Transfer and Encumbrance of Rights

Holders of rights to petroleum often require additional capital. When structuring a finance arrangements, security will likely be sought over the right, permit or licence. It is therefore important for an investor and holder to know whether or not the rights held by the holder can be transferred and encumbered. Restrictions on the transferability and encumbrance of rights to petroleum will affect the type of funding arrangement for a particular project.²⁹³

Petroleum legislation typically provide for the transfer and encumbrance of rights to petroleum.²⁹⁴ For example, in Ghana a contractor or subcontractor may not assign (directly or indirectly) his rights and obligations under a petroleum contract, in whole or in part, to a third party without the prior written consent of the Secretary.²⁹⁵ Furthermore, a contractor or subcontractor may not transfer any shares in its incorporated company in Ghana to a third party either directly or indirectly without the written approval of the Secretary if the transfer will amount to a change in control in the company or control over the interest of shareholder who owns more than 5% of the shares in the company.²⁹⁶ In Australia, petroleum titles may not be transferred unless it has been approved by the Titles Administrator and an instrument of transfer is

²⁹⁰ Section 284 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth).

²⁹¹ Section 9 of the Petroleum (Exploration and Production) Law, 1984.

²⁹² Article 62 of *Lei 10_04 de 12 de Novembro das Actividades Petroliferas* (Petroleum Activities Law).

²⁹³ McCormick RS “Legal Issues in Project Finance” (1983) *Journal of Energy and Natural Resources Law* 21 at 29.

²⁹⁴ Onorato (note 37) at 40.

²⁹⁵ Section 23(1) of the Petroleum (Exploration and Production) Law, 1984.

²⁹⁶ Section 23(16) of the Petroleum (Exploration and Production) Law, 1984.

registered under the relevant legislation.²⁹⁷ Furthermore, a dealing (which includes creation or assignment of an interest or right in an existing title) is of no force until the Titles Administrator has approved the dealing and made the necessary entry into the relevant register.²⁹⁸ In the Netherlands, a licence holder may only transfer a licence or part of the licence with the written permission of the Minister.²⁹⁹

What is important about all the mentioned jurisdictions is that all of them recognise that authorisations to petroleum may be transferred or encumbered – there is no outright prohibition on the transfer or encumbrance of petroleum authorisations or an interest in petroleum authorisations. This way, the regulatory frameworks recognise the practical need of ensuring petroleum authorisations, or an interest therein, can be encumbered to raise necessary capital.

In South Africa, reconnaissance permits and technical co-operation permits cannot be transferred, unlike an exploration right or production right which can be transferred and encumbered provided ministerial consent has been obtained.³⁰⁰ More specifically in respect of encumbrance, an exploration right or an interest in an exploration right, or a controlling interest in a company or close corporation may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.³⁰¹ The Minister must grant consent if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of is capable of carrying out and complying with the obligations and the terms and conditions of the exploration or production right and the holder complies with the requirements set for applicants for exploration and production rights.³⁰² The discretion of the Minister to

²⁹⁷ Section 472 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth).

²⁹⁸ Section 487 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth).

²⁹⁹ Article 20 of the Mining Act 2003 (*Mijnbouwwet* 2003).

³⁰⁰ Section 82(1)(d) and section 86(1)(c) of the MPRD Act.

³⁰¹ Section 82(1)(c) and section 86(1)(c) read with section 11(1) of the MPRD Act. Subsection 11(1) is substituted by section 8(a) of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, which will be put into operation by proclamation. The new section will read as follows: “A prospecting right or mining right or an interest in any such right, or any interest in a close corporation or unlisted company or any controlling interest in a listed company (which corporations or companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, let, sublet, assigned alienated or otherwise disposed of without prior written of the Minister.”

³⁰² Section 11(2) of the MPRD Act.

grant the consent is therefore limited – he must grant the consent if the requirements of the MPRD Act are met.

In Namibia, as with South Africa, exploration and production licences can only be transferred with Ministerial consent. Unlike South Africa, however, reconnaissance licences are transferable.³⁰³ Furthermore, under the Petroleum Act no person may grant, cede or assign any interest in a petroleum licence to any other person or be joined as a joint holder of a petroleum licence other than in writing and with the approval of the Minister.³⁰⁴ Application must be made to the Petroleum Commission in such form as may be determined by the Minister.³⁰⁵

The prohibition on transferring and encumbering exploration and production rights without ministerial consent as worded in the MPRD Act gives rise to some interpretative difficulties.³⁰⁶ For example, it is unclear what is meant by “interest” in an exploration or “alienated or otherwise disposed of” or “controlling interest”.³⁰⁷ Furthermore, does cession refer to an out-and-out cession only or does it include a security cession (cession *in securitatem debiti*) as well?³⁰⁸

The interpretation of the section may be approached in one of two ways.³⁰⁹ First, because it amounts to a restraint on alienation, it must be interpreted strictly.³¹⁰ Secondly, and possibly contradictory, the section must be interpreted with the purpose of the section and the objects of the MPRD Act in mind.³¹¹ The MPRD Act itself seems to support the second approach by stating that, when a provision of the MPRD Act is

³⁰³ Section 9(1)(b) of the Petroleum Act.

³⁰⁴ Section 9(1)(b) of the Petroleum Act.

³⁰⁵ Section 11(1)(b) of the Petroleum Act.

³⁰⁶ Dale et al (note 9) at MPRD-162.

³⁰⁷ See for example Van der Merwe M and Ferreire E "Will Amendments to the MPRDA make Foreign Investment any Easier?" September 2013 *Without Prejudice* 26 at 26. On controlling interest, see Dale et al (note 9) at MPRDA-169–MPRD-172 and Moore G and Veldsman J "Big Brother and the Holding Company: Ministerial Consent to Dispose of Indirect Controlling Interests in Mining Companies" 2013 (130) *SALJ* 85.

³⁰⁸ Dale et al (note 9) at MPRD-173.

³⁰⁹ Dale et al (note 9) at MPRD-162.

³¹⁰ Dale et al (note 9) at MPRD-162. This approach is based on the presumptions that statute law is not unjust, inequitable or unreasonable and a restrictive approach must be taken in respect of interpretations of restraints on alienation in contract. See Dale et al (note 9) at MPRD-162 and the authorities cited there.

³¹¹ Dale et al (note 9) at MPRD-162. This purposive approach is supported by section 4 of the MPRD Act.

interpreted, any reasonable interpretation which is consistent with the objects of the Act must be preferred.³¹²

So, for example, when a restrictive interpretation is applied to “cession”, it may refer only to an out-and-out cession and not a cession *in securitatem debiti* as well.³¹³ However, in normal legal parlance a cession refers to both out-and-out cessions as well as cessions *in securitatem debiti* and any literal interpretation of this section should accordingly refer to both cessions.³¹⁴

For holders of exploration and production rights to be in a position to exploit the right optimally, they must be in a position to use the right to obtain financing. This can be done by various means, including mortgaging the right. However, the section dealing with the transfer and encumbrance of exploration rights does not refer to encumbrance by mortgage.³¹⁵ Even so, it is stated later in the section that consent of the Minister is not required for the encumbrance by mortgage of an exploration or production right or interest in such a right as security to obtain a loan or guarantee for the purpose of funding or financing of an exploration or production project by certain banks or financial institutions,³¹⁶ provided that the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to the consent of the Minister.³¹⁷

This creates confusion whether the prohibition on transfer and encumbrance of rights envisage mortgage of a licence as well.³¹⁸ A restrictive interpretation will exclude encumbrance by means of mortgage from requiring the Minister’s consent, as including it will broaden the scope of the prohibition.³¹⁹ It may, however, also be argued that the subsequent reference to mortgage shows an intention to include mortgage under the

³¹² Section 4 of the MPRD Act.

³¹³ Dale et al (note 9) at MPRD-173.

³¹⁴ Dale et al (note 9) at MPRD-173.

³¹⁵ Dale et al (note 9) at MPRD-172.

³¹⁶ This section only applies to banks as defined in the Banks Act 94 of 1990 and financial institutions approved for this purpose by the Registrar of Banks on request by the Minister. See section 11(3) of the MPRD Act.

³¹⁷ Section 11(3) of the MPRD Act.

³¹⁸ Dale et al (note 9) at MPRD-172.

³¹⁹ Dale et al (note 9) at MPRD-172.

prohibited actions.³²⁰ Dale *et al* are, however, of the opinion that applying a restrictive approach here is not inconsistent with the objects of the MPRD Act, as any foreclosure on the mortgage will in any event require ministerial consent.³²¹

The Petroleum Act Namibia is also unclear as to what amounts to an interest in a licence and no guidance is given in the Act or in case law in Namibia on how to interpret it, other than using the normal rules of statutory interpretation. For example, it is unclear whether shareholding in the company holding the licence will fall under the definition of interest in a licence and whether Ministerial consent is required when transferring shares in the holder. Unlike the MPRD Act, the Petroleum Act does not refer to a change in the controlling interest requiring Ministerial consent.

In South Africa, any transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of an exploration or production right must be lodged for registration at the Mineral and Petroleum Titles Registration Office.³²² Lodgement must take place within sixty days of the relevant transaction.³²³ In Namibia, the provisions relating to application for a petroleum licence or renewal of a petroleum licence insofar as they relate to the powers of the Minister after receiving the application apply to applications for transfer of petroleum licences or the grant, cession or assignment of interests in petroleum licence or the joining of joint holders in a petroleum licence as well.³²⁴ The transfer of a licence does not affect any legal proceedings instituted against the holder.³²⁵ The granting, ceding or assigning of an interest in the licence does not affect any obligations or liability of the holder imposed in terms of the licence or the Petroleum Act.³²⁶

The MPRD Act and the Petroleum Act make it possible to transfer and encumber rights to petroleum. The Acts, however, are not clear as to what type of transactions are allowed under the Acts and the exact scope of the relevant provisions is uncertain. The legislature should amend these provisions to provide more clarity. Furthermore,

³²⁰ Dale *et al* (note 9) at MPRD-172.

³²¹ Dale *et al* (note 9) at MPRD-172.

³²² Section 11(4) of the MPRD Act.

³²³ Section 11(4) of the MPRD Act.

³²⁴ Section 12 of the Petroleum Act.

³²⁵ Section 11(3) of the Petroleum Act.

³²⁶ Section 11(4) of the Petroleum Act.

another issue that may be a problem for petroleum companies is the timing in respect of security. To illustrate, when a petroleum company enters into a security agreement in terms whereof security is granted over the petroleum right or licence, it is uncertain when exactly the consent of the Minister should be obtained. It may either be at the conclusion of the agreement, or only upon enforcement of the agreement. In Namibia in practice, the Minister does not entertain applications for consent for entering into a security agreement in respect of a petroleum licence – the Ministry's view is that consent is only required when enforcing the security. This creates a problem, as the holder of the security can never be guaranteed that the Minister will give his consent when the security is to be enforced. There needs to be more certainty from the outset whether the security will be enforceable or not.

3.3.6 Recordkeeping / Reporting

Proper recordkeeping and reporting ensures continued transparency within a petroleum legislative framework. Not only does recordkeeping and reporting obligations give greater certainty to holders as to their duties, but it also ensures that the public is kept informed of the activities of holders of rights to petroleum. It furthermore enables a state to exercise proper control over the functions of the holder, thereby promoting transparency.

In terms of the South African MPRD Act, a holder of a technical co-operation or reconnaissance permit must submit progress reports to Petroleum Agency SA. These reports must detail the progress achieved as described in the work programme.³²⁷ The reports must be submitted twelve months from the date of issue of the permit or at the end of the period for which the permit is granted if the period is granted for less than twelve months.³²⁸

The level of reporting is much stricter with exploration rights than with reconnaissance permits and technical co-operation permits with regard to the frequency of submissions. The holder of an exploration right must submit timeous, accurate reports to the

³²⁷ Regulation 21(1) and regulation 26(1) of the MPRD Regulations.

³²⁸ Regulation 21(2) and regulation 26(2) of the MPRD Regulations.

designated agency on a monthly, quarterly and annual basis.³²⁹ The MPRD Regulations prescribe the content of the reports.³³⁰

A holder of any authorisation in respect of petroleum must supply the designated agency digital and, where appropriate, hard copies of all data, reports and interpretations generated.³³¹ It must be provided in a format and medium as agreed upon with the designated agency and must be done as soon possible after completion of the operations or the projects.³³² The designated agency must in turn submit the progress reports and data to the Council for Geoscience. This must be done within thirty days after the designated agency has received the reports.³³³

All information, data, reports and interpretations must, subject to the Promotion of Access to Information Act,³³⁴ be kept confidential by the designated agency. Confidentiality is only for a maximum period of four years or until the date on which the permit lapses or is cancelled or terminated or the area to which the permit relates has been abandoned or relinquished.³³⁵

Unlike its South African counterpart, the Namibian Petroleum Act does not have different levels of reporting for different licences; holders are subjected to the same reporting requirement, regardless of the type of petroleum licence. Holders must keep proper record regarding its operations.³³⁶ The record must be kept in such form as may be determined by the Commissioner.³³⁷ Twice a year, the holder must submit a summary of the geological and geophysical work carried out and drilling activities performed.³³⁸ The holder must also submit a list of maps and geological and geophysical reports prepared by or on behalf of the holder in connection with the

³²⁹ Regulation 31(1) of the MPRD Regulations. Monthly reports must be submitted within seven days after each month-end, quarterly reports within twenty-one days of the end of a particular quarter and annual reports within sixty days of each calendar year end. See regulation 31 of the MPRD Regulations.

³³⁰ See Regulation 31 of the MPRD Regulations.

³³¹ Regulation 22, regulation 27, regulation 32 and regulation 37 of the MPRD Regulations.

³³² Regulation 22, regulation 27, regulation 32 and regulation 37 of the MPRD Regulations.

³³³ Section 88(1) of the MPRD Act.

³³⁴ Act 20 of 2002.

³³⁵ Section 88(2) of the MPRD Act.

³³⁶ Section 18(1) of the Petroleum Act.

³³⁷ Section 18(2) of the Petroleum Act.

³³⁸ Section 18(1)(c)(i) of the Petroleum Act.

exploration operations, which must also be submitted twice year.³³⁹ Failure to comply with the reporting provisions is a criminal offence.³⁴⁰

Within sixty days after the end of each year of the currency of the licence, the holder must submit to the Commissioner a return in respect of the results of the operations carried out during the previous year and the estimates of petroleum recoverable in the area to which the licence relates for the period ending on the last day of the succeeding year.³⁴¹ On each day on which drilling operations are carried out, the holder must submit a report on such drilling operations carried out on the previous day.³⁴²

In the event that the licence is cancelled or expires, the holder thereof must, within three months of the date of cancellation or expiry date, deliver to the Commission all reports, maps and plans as well as all tapes, diagrams, profiles and charts prepared by or on behalf of the holder in respect of the licence and such other books, document, records and reports as the Commissioner may require.³⁴³ Failure to do so is a criminal offence.³⁴⁴

Both the MPRD Act and the Petroleum Act obliges the holder to keep proper records and report to the state on its activities. This ensures proper continues control over petroleum companies by the state. It also ensures that the activities of petroleum companies do not take place in a clandestine manner. Public access to these records are, however, restricted or otherwise not provided for. Restricting access for the public to information gathered and held by petroleum companies may be in commercial interest, as petroleum companies may want to keep this information confidential to protect them from their competitors, who may use the information to compete directly with the holder. The lack of transparency in this case may therefore be justified

³³⁹ Section 18(1)(c)(ii) of the Petroleum Act.

³⁴⁰ Section 18(3) of the Petroleum Act.

³⁴¹ Section 18(1)(d) of the Petroleum Act.

³⁴² Section 18(1)(e) of the Petroleum Act.

³⁴³ Section 18(2) of the Petroleum Act.

³⁴⁴ Section 18(3) of the Petroleum Act.

4. Assessment and Concluding Remarks

The legislation in South Africa and Namibia regulating access to petroleum resources only applies to resources that fall under the statutory definition of petroleum. The definition of petroleum in the MPRD Act in South Africa and the Petroleum Act in Namibia may be considered the “threshold” that must be passed before invoking the provisions of these two Acts. The definition of petroleum in both the Namibian and South African acts accords with international definitions and the geological understanding of petroleum. If the definition is broken up into its different requirements, it is easier to determine whether a substance qualifies as petroleum. Nevertheless, there is a rise in the popularity of unconventional petroleum resources. The legislature may have to amend the definition of petroleum to ensure that there is no confusion whether certain resources, such as shale gas, are regulated by the relevant legislation.

Different rights may be granted in respect of petroleum. The type of right will depend on what the holder intends to do. So, for example, if a petroleum company intends to search for petroleum, it can apply for a reconnaissance permit or exploration right (in South Africa) or a reconnaissance licence or exploration licence (in Namibia). If the company merely intends to collect information by means of aerial surveys, it should apply for a reconnaissance permit or reconnaissance licence. However, if the company intends to employ more extensive operations, it should apply for an exploration licence or exploration right. If the company intends to extract (produce) petroleum, it needs a production right (in South Africa) or production licence (in Namibia).

The different types of rights a company can apply for in respect of petroleum is discussed in some detail in the MPRD Act and the Petroleum Act. These Acts sets out the application procedure, the rights of holders and the terms and conditions upon which rights and licences are issued.

With regard to the content of authorisation granted in Namibia and South Africa in respect of petroleum, the legislation of both countries cover the essential elements. The legislative framework prescribes the nature of the activities authorised by the right, permit or licence and the duration and renewal possibilities.

The transfer and encumbrance of rights and licences are dealt with in the MPRD Act and the Petroleum Act. Under the MPRD Act, technical co-operation permits and reconnaissance permits may not be transferred or encumbered. As a result, these rights cannot be used to raise finance. Exploration rights, production rights, exploration licences and production licences are, however, transferable and may also be encumbered. The South African MPRD Act deals in much more detail with the transfer and encumbrance of rights than the Namibian Petroleum Act. Nevertheless, both Acts are unclear as to what transactions are caught and will require ministerial consent. This uncertainty creates a problem for holders and their legal representatives. The legislature needs to amend the legislation to clarify what transactions require ministerial consent.

The application procedure for exploration and production rights in South Africa requires that notification be given to interested and affected parties and that they be given an opportunity to give their views and to object to the granting of these rights. This is a very important step in ensuring that the interests of the people of South Africa are protected as well and that they are heard on decisions that affect them. The same requirement is not present in the Namibian legislation. However, as discussed in the next chapter, interested and affected parties will have an opportunity to be heard during the process of applying for environmental authorisations.³⁴⁵

To enable the state to exercise proper control over licence holders, both Acts also require strict reporting and recordkeeping. This promotes transparency of the petroleum regulatory regime and accountability of the state, who is kept informed of the operations. However, as stated above, public access to these reports and records are not provided for. Although this may be seen as contrary to transparency, it may be justified based on commercial grounds.

This chapter deals with the primary legislation regulating the petroleum exploitation process in the upstream industry. Petroleum exploitation, however, operates within a wider regulatory framework. While the legislation for upstream petroleum resources discussed in this chapter primarily determines how access to these resources is obtained

³⁴⁵ See paragraph 2.4.2.2.1 of Chapter Six below.

and what the content of this access is, they are not the only legislative measures determining access to petroleum. An important aspect of the regulatory framework for the petroleum exploitation process is the effect of petroleum exploitation on the environment. The legislation dealing with this gives further content to access to petroleum. The following chapter therefore expands on the regulatory framework for petroleum by focusing on the framework for environmental protection during the petroleum exploitation process.

Chapter Six:

PETROLEUM EXPLOITATION AND THE RIGHT TO A CLEAN ENVIRONMENT

1. Introduction

As the world's biggest commodity,¹ petroleum adds value to the daily lives of people. It has played a positive role in industrial development and the modern way of life by contributing to economic growth and a higher standard of living.² This benefit, however, comes at a price.³ The effect that petroleum exploitation has on the environment is receiving increasing international attention. Petroleum has the capacity of polluting the land, sea and atmosphere and is a major contributor in the depletion of the ozone layer⁴ and has left a profound adverse impact on the global environment.⁵ Petroleum extraction takes place deep beneath the surface of the land, sometimes in environmentally sensitive areas, and the petroleum itself is made up of extremely toxic chemicals.⁶

The Exxon Valdez oil spill in 1989⁷ and the more recent 2010 well blow-out of BP's leased Deepwater Horizon rig⁸ highlighted the effect that the exploitation, production

¹ See paragraph 1 of Chapter One above.

² Gao Z "Environmental Regulation of Oil and Gas in the Twentieth Century and Beyond: An Introduction and Overview" in Gao Z (ed) *Environmental Regulation of Oil and Gas* (1998) London Kluwer Law International at 3; Waskow D and Welch C "The Environmental, Social, and Human Rights Impacts of Oil Development" in S Tsalik and A Schiffrin (eds), *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York, Open Institute Society at 101.

³ Waskow and Welch (note 2) at 101.

⁴ Omorogbe Y *Oil and Gas Law in Nigeria* (2003) Lagos Malthouse Press Limited at 17.

⁵ Gao (note 2) at 3.

⁶ Waskow and Welch (note 2) at 101.

⁷ In 1989, the supertanker Exxon Valdez tore its hull and ruptured eight of its eleven cargo tanks, which resulted in the spill of approximately 10.8 million gallons of crude oil. Clean-up efforts cost Exxon around US\$2.1 billion. Exxon was further fined US\$125 million and settled the civil action instituted against it by the United States and State of Alaska for environmental damage by agreeing to pay at least US\$900 million for restoring natural resources and another US\$300 million in voluntary settlements with private individuals. See Moreland I "From the Exxon Valdez to the Deepwater Horizon: Will BP's Dollar Reach Where the Oil Didn't" 2011 (14) *Sustainable Development Law Journal* 117 at 118 – 119.

⁸ The 2010 well blow-out of BP's leased Deepwater Horizon rig was the largest oil spill in the United States and resulted in the death of eleven men, caused as a result of a malfunctioning blow-out preventer. An estimated four million barrels of oil spilled into the Gulf of Mexico. See

and transport of this precious commodity has on the environment.⁹ The Deepwater Horizon is an example of a catastrophe that occurred during the production stage, where an estimated four million barrels of produced oil spilled into the Gulf of Mexico. By contrast, the Exxon Valdez demonstrates the catastrophic consequences that may accompany transport of petroleum, where the supertanker Exxon Valdez tore its hull and ruptured eight of its eleven cargo tanks, which resulted in the spill of approximately 10.8 million gallons of crude oil.

Disastrous incidents such as the ones mentioned above are not only a major concern for the petroleum company doing the exploitation and the host government within whose borders the incident occurs; it affects the lives of many other, including the citizens of the host country.¹⁰ Petroleum exploitation also raises socio-economic, cultural and human rights issues.¹¹ A well-known example of the human rights / environment aspect of petroleum exploitation is the failure by the Nigerian government to protect the interest of the Ogoni people, who regard the environment as sacred.¹² The objection by the Ogoni people against the effects of petroleum exploitation on the environment was met with fierce, even violent, protest.¹³

Moreover, new methods of recovering petroleum, such as horizontal drilling and hydraulic fracturing,¹⁴ raise new environmental concerns.¹⁵ These concerns relate

⁹ Grant J "What Can We Learn from the 2010 BP Oil Spill? Five Important Corporate Law and Life Lessons" 2010-2011 (42) *McGeorge Law Review* 809 at 809-810; Moreland (note 7) at 120.

See Waskow and Welch (note 2) at 101; Havemann L "Environmental Law and Regulation" in Gordon G, Paterson J and Üşenmez E (eds) *Oil and Gas Law: Current Practices and Emerging Trends* 2ed (2011) Dundee Dundee University Press at 231.

¹⁰ Koons JE "Earth Jurisprudence and the Story of Oil: Intergenerational Justice for the Post-Petroleum Period" 2011-2012 *University of San Francisco Law Review* 93 at 93 – 94.

¹¹ Gao (note 2) at 7.

¹² Blanco EM and Razzaque J *Globalisation and Natural Resources: Challenges Key Issues and Perspectives* Cheltenham Edward Elgar at 147.

¹³ See for example Blanco and Razzaque (note 12) at 147.

¹⁴ See Chapter Two and Chapter Five.

¹⁵ The hydraulic fracturing that royal Dutch Shell intends to use in the Karoo to produce shale gas elicited widely-published controversy. One of the major concerns raised is the effect that this will have on the environment. See for example Cropley E "Karoo Fracking: Water, Wealth and White" 28 October 2013 *Mail and Guardian* available at <http://mg.co.za/article/2013-10-28-karoo-fracking-water-wealth-and-whites> [accessed 02.02.2014]; SAPA "Fracking Threatens Karoo Water Reserves: Conservationists" 06 September 2013 *Times Live* available at <http://www.timeslive.co.za/scitech/2013/09/06/fracking-threatens-karoo-water-reserves-conservationists> [accessed 02.02.2014]; Karoo Space "Threat of Fracking Unites Karoo

amongst others to the unknown effects that certain substances used during the fracking process may have on water resources.¹⁶ Other concerns relate to soil contamination, earthquakes and climate change.¹⁷

Since this thesis focuses on the upstream petroleum industry, this chapter will only focus on those environmental regulations directly applicable in the upstream petroleum industry. The potential effect of upstream petroleum exploitation on the environment differs depending on the stage of the exploitation process.¹⁸ Reconnaissance operations have very little, if any, negative impact on the environment.¹⁹ The impact of petroleum activities on the environment increases as the exploitation activities progress.²⁰ Finally, the methods employed in the production of petroleum are invasive and often take place in remote and environmentally sensitive locations.²¹

Environmental obligations in respect of petroleum principally involve the relationship between the holder and the state as agent of its people. This chapter therefore expands on what the previous chapter has discussed.²² Environmental regulation also operates in the interest of the nation by ensuring that people's right to a clean environment is respected and upheld. The potential benefit that oil exploitation can provide to a country must be weighed up against the potential environmental consequences of oil exploitation for that country.²³ The state, as regulator of access to petroleum resources and agent of the nation,²⁴ has to ensure that a balance is struck between the potential benefit of petroleum exploitation and the right to a clean environment. This is achieved through a transparent and accountable legislative framework in respect of petroleum exploitation and environmental protection.

Communities" available at <http://karoospace.co.za/threat-of-fracking-unites-karoo-communities/> [accessed 02.02.2014].

¹⁶ See Staff Reporter "Fracking" *Insight* May 2013 at 31.

¹⁷ Parliamentary Commission for the Environment *Evaluating the Environmental Impacts of Fracking in New Zealand* November 2012 at 28 – 29.

¹⁸ See Chapter Two above. See also Table 1.1 in Gao (note 2) at 5, where the author lists the major environmental concerns during each phase of the petroleum exploitation process.

¹⁹ Gao (note 2) at 7.

²⁰ See paragraph 3.2. below. See also Gao (note 2) at 7.

²¹ Waskow and Welch (note 2) at 101.

²² Chapter Seven.

²³ See Waskow and Welch (note 2) at 102.

²⁴ See Chapter Five above.

The petroleum environment regulatory framework on an international level is faced with many issues. For example, the bulk of international, regional and “soft law” provisions do not deal specifically with environmental control of petroleum operations and where they do, this is typically limited to offshore operations.²⁵ Furthermore, few countries follow an integrated legislative approach, where legislation is passed dealing specifically with petroleum exploitation and environmental protection.²⁶ Instead, countries generally follow statutory or contractual approaches, where environmental provisions may be found in various statutes or based on petroleum agreements.²⁷ Namibia and South Africa follow the same approach where environmental provisions are found in a number of statutes and, in the case of Namibia, in a petroleum agreement. These provisions are discussed in more detail below.

2. Enforcement of the Right to a Clean Environment

Proper control by the government over the environment is important, as government oversight plays a role in the degree of environmental damage.²⁸ The constitutional measures that establish the right to a clean environment were discussed above in Chapter Four. Environmental considerations must be accorded the appropriate respect and recognition in the administrative processes of the country to ensure accountability of the state. In the context of petroleum, the functionaries awarding rights to petroleum²⁹ play a pivotal role in the “administrative processes” relating to petroleum regulation. The state, through these functionaries, therefore has a constitutional duty to consider the environment when fulfilling their duties.³⁰

Furthermore, in terms of the South African Constitution, everyone is entitled to have the environment protected through reasonable legislative and other measures.³¹ In response to this, the South African Parliament promulgated the National Environmental

²⁵ Gao (note 2) at 29.

²⁶ Gao (note 2) at 37.

²⁷ Gao (note 2) at 32 – 37.

²⁸ Waskow (note 2) at 102.

²⁹ See Chapter Seven above.

³⁰ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 142.

³¹ Section 24(b) of the South African Constitution.

Management Act³² (“**NEMA**”). The Namibian Parliament also promulgated similar legislation, namely the Environmental Management Act³³ (“**EMA**”), despite there not being a constitutional obligation to enact such legislative measures.

Across the globe, a number of environmental management tools have developed. Some of these have been adopted in the NEMA and EMA. Before discussing the statutory enforcement of the right to a clean environment, these principles will briefly be discussed.

2.1. Environmental Management Tools

The rise of environmental awareness in the 1970s and the concomitant new measures for environmental control and regulation led to the introduction of new environmental policy and regulatory tools in respect of petroleum exploitation.³⁴ These tools include environmental assessments (EAs), environmental management plans or programmes (EMPs), environmental reporting, environmental insurance programmes, decommissioning and abandonment funds and plans and environmental monitoring and auditing.³⁵

EAs may be defined as “the analysis of the likely environmental consequences of a proposed human activity”.³⁶ An EA is a “planning tool” or “precautionary measure” that assists decision-makers in taking environmental concerns into account when deciding whether or not to approve a permit, right or licence.³⁷ An EA furthermore allows industry participants the opportunity to consider potential environmental impacts

³² National Environmental Management Act 107 of 1998 (“**NEMA**”).

³³ Environmental Management Act 7 of 2007 (“**EMA**”).

³⁴ For the first half of the twentieth century, there was limited provision in legislation dealing with pollution resulting from petroleum exploitation. For example, an EU environmental impact regime (Council Directive 85/337/EEC of 27 June 1985) was only introduced in 1985. The first comprehensive UK petroleum pollution law was passed only in 1971. The first comprehensive petroleum legislation dealing with the environmental effects of petroleum exploitation in the USA was only passed in 1990. Gao (note 2) at 10, 11, 32 and 40; Havemann (note 9) at 231; Gordon G “Petroleum Licencing” in Gordon G, Paterson J and Üşenmez E (eds) *Oil and Gas Law: Current Practices and Emerging Trends* 2ed (2011) Dundee Dundee University Press at 81.

³⁵ Gao (note 2) at 40 – 42; Glazewski J and Du Toit L (eds) *Environmental Law of South Africa* (2013) Durban LexisNexis; Kidd M *Environmental Law* 2 ed (2011) Claremont Juta & Co Ltd at 235.

³⁶ Glazewski and Du Toit (note 35) at 10-3.

³⁷ Glazewski and Du Toit (note 35) at 10-3; Gao (note 2) at 40.

of petroleum exploitation and put measures in place to mitigate these impacts.³⁸ EAs targeting specific projects are generally referred to as environmental impact assessments (EIAs), as opposed to strategic environmental assessments (SEAs), which covers the assessment of plans, policies and programs.³⁹ Under established regimes, EAs are mandatory in respect of petroleum operations.⁴⁰ EIAs are incorporated into legislation more frequently, as well as in industry guidelines.⁴¹

An environmental management plan or programme (EMP) is a “dynamic set of objectives, targets, actions and responsibilities prepared for the management of a particular project or area”⁴² and typically sets out the company’s environmental policy and objectives.⁴³ EMPs supplement EIAs⁴⁴ and may include information in respect the company’s environmental personnel, emergency incident action plans, training and awareness and review procedures in respect of environmental procedures.⁴⁵

Some countries additionally require petroleum companies to submit environmental reports. These have to be submitted at certain intervals and / or following certain incidents and have to contain information relating to the impact of petroleum exploitation on the environmental situation.⁴⁶

Environmental monitoring and audit is another environmental management tool and on similar to environmental reporting. This tool is often used by industry for internal management purposes and is considered one of the most effective tools in managing environmental protection, as it facilitates environmental management and control of environmental protection, evaluates environmental performance and ensure compliance with environmental obligations.⁴⁷ Regulators, the public and environmental

³⁸ Gao (note 2) at 40.

³⁹ Glazewski and Du Toit (note 35) at 10-3.

⁴⁰ EU Council Directive 85/337/EEC of 27 June 1985 and Havemann (note 9) at 244.

⁴¹ Armstrong K “Managing Environmental Legal Risks in Oil and Gas Exploration and Production Activities” in Gao Z (ed) *Environmental Regulation of Oil and Gas* (1998) London Kluwer Law International at 372.

⁴² Glazewski and Du Toit (note 35) at 10-10.

⁴³ Gao (note 2) at 41.

⁴⁴ Armstrong (note 41) at 372.

⁴⁵ Gao (note 2) at 41.

⁴⁶ Gao (note 2) at 41.

⁴⁷ Gao (note 2) at 42.

organisations are also increasingly demanding environmental auditing and the sharing of such auditing results.⁴⁸

A number of petroleum-producing countries have introduced environmental insurance programmes as another environmental management tool. Environmental insurance policies would typically cover pollution liability and clean-up expenses.⁴⁹ Finally, a number of countries have successfully introduced measures providing for the financing of decommissioning and abandonment – issues that have been ignored for most of the twentieth century.⁵⁰

Environmental assessments and environmental managements plans or programmes *per se* do not curb or minimise environmental damage, but form part of a larger framework of environmental management tools that must apply throughout a project.⁵¹ The purpose of these tools is to provide a decision-maker with the relevant information to enable it to exercise its decision-making function.⁵² Environmental management principles must therefore be imposed through the whole petroleum exploitation process and not just in the planning or application stage.

2.2 The Intersection between the Regulation of Petroleum and Environmental Protection

Environmental legislation is typically administered by the Department or Ministry responsible for the environment. In South Africa, this is the Department of Environmental Affairs, while in Namibia it is the Ministry of Environment and Tourism. Petroleum legislation, on the other hand, is regulated by the Department or Ministry responsible for petroleum resources. In South Africa, it is the Department of Mineral Resources, while in Namibia it is the Ministry of Mines and Energy. This is in

⁴⁸ Armstrong (note 41) at 373.

⁴⁹ Gao (note 2) at 42.

⁵⁰ Gao (note 2) at 42.

⁵¹ Glazewski and Du Toit (note 35) at 10-2 – 10.3.

⁵² See for example EU Council Directive 85/337/EEC of 27 June 1985 and Gordon (note 34) at 81.

line with more mature jurisdictions, which separates the administration of petroleum laws from the administration of environmental laws.⁵³

The environmental aspects of petroleum regulation lead to an interesting intersection between the governmental agencies responsible for environment and the governmental agencies responsible for petroleum and the enforcement of environmental rights. The NEMA contains various provisions in respect of co-operative governance in respect of environmental issues. The Department of Mineral Resources is recognised in the NEMA as a national department exercising functions involving the management of the environment.⁵⁴ As such, the Department must prepare an environmental management plan every five years.⁵⁵ Broadly, the contents of this plan must reflect how the functions of the Department of Mineral Resources involve the management of the environment.⁵⁶ The NEMA lists various purposes of this plan. First, its purpose is to coordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and of provincial and local spheres of government, to minimise duplication of procedures and functions and promote consistency in the exercise of functions that may affect the environment.⁵⁷ Secondly, its purpose is to give effect to the constitutional principles of co-operative

⁵³ Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §1.23, with reference to the regulation of petroleum and the environment in the UK and Norway.

⁵⁴ Section 11(2) read with Schedule 2 of the NEMA.

⁵⁵ Section 11(2) of the NEMA.

⁵⁶ Glazewski and Du Toit (note 35) at 7-17 and section 14 of the NEMA which states that “[e]very environmental management plan must contain (a) a description of the functions exercised by the relevant department in respect of the environment; (b) a description of environmental norms and standards, including norms and standards contemplated in section 146(2)(b)(i) of the Constitution, set or applied by the relevant department; (c) a description of the policies, plans and programmes of the relevant department that are designed to ensure compliance with its policies by other organs of state and persons; (d) a description of priorities regarding compliance with the relevant department's policies by other organs of state and persons; (e) a description of the extent of compliance with the relevant department's policies by other organs of state and persons; (f) a description of arrangements for cooperation with other national departments and spheres of government, including any existing or proposed memoranda of understanding entered into, or delegation or assignment of powers to other organs of state, with a bearing on environmental management; and (g) proposals for the promotion of the objectives and plans for the implementation of the procedures and regulations referred to in Chapter 5.”

⁵⁷ Section 12(a) of the NEMA.

governance.⁵⁸ Thirdly, its purpose is to secure the protection of the environment across the country as a whole.⁵⁹ Fourthly, its purpose is to prevent unreasonable actions by provinces in respect of the environment that are prejudicial to the economic or health interests of other provinces or the country as a whole.⁶⁰ Finally, its purpose is to enable the Minister of Environment to monitor the achievement, promotion, and protection of a sustainable environment.⁶¹

The EMA in Namibia has similar obligations in respect of co-operative governance that the NEMA has.⁶² These provisions are, however, not yet applicable as the Minister of Environment and Tourism has not yet identified the organs of state responsible for drafting these plans.⁶³

Aside from the principles relating to co-operative governance, both the NEMA and the EMA recognise the Minister of Mineral Resources in South Africa and the Minister of Minerals and Energy in Namibia as “competent authorities” in terms of the NEMA and the EMA. By doing so, these line Ministers have a duty to take the environment into consideration when regulating petroleum resources.

The intersection between governmental agencies responsible for the environment and petroleum may have as a result that the responsibilities of the agency responsible for petroleum towards the environment play second fiddle to furthering the primary objectives of that agency towards developing and promoting the petroleum industry.⁶⁴ The state, through its various agencies, therefore has the responsibility of ensuring that various interests are balanced. First, the interests towards promoting the petroleum industry must be balanced with environmental interests. Secondly, the interests of people towards a clean environment must be balanced with the financial interests of holders and investors. Because of the conflicting nature of these interests, the spread of

⁵⁸ Section 12(b) of the NEMA. See also section 41 of the Constitution of the Republic of South Africa, 1996.

⁵⁹ Section 12(c) of the NEMA.

⁶⁰ Section 12(d) of the NEMA.

⁶¹ Section 12(e) of the NEMA.

⁶² Part VI of the EMA.

⁶³ See section 24(1) of the EMA.

⁶⁴ Burns Y and Kidd M “Administrative Law & Implementation of Environmental Law” in Strydom HA and King ND (eds) *Fuggle & Rabie's Environmental Management in South Africa* (2009) Wetton Juta Law at 240.

environmental responsibilities between governmental agencies with different policy objectives is justified.

2.3 Enforcement in terms of the Constitution

Both the South African and Namibian Constitutions provide for the protection of the environment. In South Africa, the right to a clean environment is enforced as fundamental right of the Bill of Rights. Namibia does not entrench the right to environmental protection, but provides for it under the principles of state policy, which are not enforceable.⁶⁵ The drafters of the South African Constitution opted to include environmental protection in its Bill of Rights and thereby explicitly stated that human rights have an environmental dimension,⁶⁶ rather than recognising it as civil and political rights, as is the case with the Namibian Constitution.⁶⁷ The environmental right in South Africa is not limited to citizens of South Africa, but to all persons.⁶⁸ This environmental right consists of two rights: the right to an environment that is not harmful to health or well-being, and the right to have the environment protected through reasonable legislative and other measures.⁶⁹ The effect of this is that the entrenchment of the right to the environment in South Africa is rendered justiciable, whereas in Namibia it is not.⁷⁰

Any person acting in his own interest has the right to approach a competent court in South Africa if the environmental right has been infringed or threatened.⁷¹ The same applies to any person acting on behalf of another person who cannot act in his own interest, as a member of or in the interest of a group or class of persons or in the public interest.⁷² Finally, an association acting in the interest of its members may also approach a competent court in case of an infringement or threatened infringement of the

⁶⁵ See Chapter Four above.

⁶⁶ Du Bois F and Glazewski J "The Environment and the Bill of Rights" in *Bill of Rights Compendium* Service Issue 27 ed (2010) Durban, LexisNexis at 2B-4.

⁶⁷ Du Bois and Glazewski (note 66) at 2B-7. See paragraph 2.2 below for a discussion of the Namibian Constitution of the Republic of Namibia, 1990.

⁶⁸ This is supported by the fact that the wording of section 24 does not limit the operation of this section to citizens only. Compare the wording of section 24 ("...[e]veryone has the right...") with that of other sections, for example section 22 ("...[e]very citizen has the right...").

⁶⁹ Glazewski (note 29) at 19-6.

⁷⁰ See also Chapter Four above with reference to principles of state policy in Namibia.

⁷¹ Section 38 of the South African Constitution.

⁷² Section 38 of the South African Constitution.

environmental right.⁷³ The court may grant appropriate relief, including a declaration of rights.⁷⁴

Notwithstanding the fact that the environment and sustainable development are treated as principles of state policy in Namibia, courts may have regard to these principles. Furthermore, the Constitution provides for the appointment of an Ombudsman, who is independent and subject only to the Constitution.⁷⁵ The functions of the Ombudsman include the duty to investigate complaints concerning the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and the failure to protect the beauty and character of Namibia.⁷⁶

2.4 Statutory Enforcement

Aside from enforcement of environmental rights in terms of the Constitution, there are also various statutes in place than ensure that environmental rights are observed and enforced. These statutory provisions are the most immediate, and probably the most effective, methods of ensuring that the environmental rights are recognised and given effect.

2.4.1 The Statutory Framework for Petroleum Exploitation and Environmental Protection

There is a plethora of laws dealing with various aspects of the environment and the protection of the environment in South Africa and Namibia.⁷⁷ A discussion of all legislation dealing with the environment is beyond the scope of this thesis. Only those statutory measures that are directly involved when applying for and exercising rights to petroleum (NEMA and EMA) are discussed here.

⁷³ Section 38 of the South African Constitution.

⁷⁴ Section 38 of the South African Constitution.

⁷⁵ Article 89(1) and article 89(2) of the Namibian Constitution.

⁷⁶ Article 91(c) of the Namibian Constitution.

⁷⁷ See in general Glazewski and Du Toit (note 35); Kidd (note 35); Strydom HA and King ND (eds) *Fuggle & Rabie's Environmental Management in South Africa* (2009) Wetton, Juta Law; Ruppel OC and Ruppel-Schlichting K (eds), *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life* (2013) Windhoek OrumbondePress.na & Welwitschia Verlag Dr. A. Eckl, Essen.

The NEMA and the EMA are the two principle legislative measures dealing with the environment in South Africa and Namibia respectively. These two acts must be read in conjunction with the legislation primarily dealing with petroleum exploitation.

In South Africa, the Mineral and Petroleum Resources Development Act (“**MPRD Act**”) integrates the principles of NEMA into petroleum exploitation.⁷⁸ The MPRD Act is amended by the Mineral and Petroleum Resources Amendment Act 49 of 2008 (“**MPRD Amendment Act 2008**”). Parts of this amendment act are in force. Further amendments are proposed in by the Mineral and Petroleum Resources Amendment Bill of 2012 (“**MPRD Amendment Bill 2012**”). These also deal extensively with environmental issues.

The MPRD Act seeks to ensure that the petroleum resources of South Africa are exploited in an orderly and ecologically sustainable manner.⁷⁹ The Act makes various provisions of NEMA applicable to reconnaissance, exploration and production operations.⁸⁰ The principles in section 2 of NEMA apply to exploration and production operations⁸¹ and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRD Act.⁸² It serves as the general framework within which environmental management and implementation plans must be formulated.⁸³ Any organ of state which takes a decision in terms of NEMA or any other statutory provision relating to the environment, which includes the statutory provisions in the MPRD Act, must use these principles as guidelines.⁸⁴ The principles also aid in the interpretation, administration and implementation of the NEMA, and any other law concerned with the protection or management of the environment,⁸⁵ which includes the MPRD Act.

⁷⁸ Section 38 of the MPRD Act.

⁷⁹ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 20-2.

⁸⁰ Section 37 and section 38 of the MPRD Act.

⁸¹ Section 37(1)(a) read with section 69(2) of the MPRD Act.

⁸² Section 37(1)(b) read with section 69(2) of the MPRD Act.

⁸³ Section 2(1)(b) of the NEMA.

⁸⁴ Section 2(1)(c) of the MPRD Act.

⁸⁵ Section 2(1)(e) of the MPRD Act.

The NEMA specifically provides for standing to enforce environmental laws.⁸⁶ It deals with standing not only in respect of the enforcement of NEMA, but also any other environmental laws.⁸⁷ In terms of the NEMA, any person or group of persons may seek appropriate relief in his or their own interests or in the interest of or on behalf of a person who is for practical reasons unable to institute any proceedings in terms of NEMA. It is also possible for a person to institute proceedings in terms of NEMA in the interest of or on behalf of a group or class of persons whose interests are affected, in the public interest and in the interest of protecting the environment.⁸⁸

In Namibia, the Petroleum (Exploration and Production) Act⁸⁹ (“**Petroleum Act**”) does not refer explicitly to the EMA, but the EMA itself expressly applies its provisions to petroleum exploitation. Moreover, before the Minister of Mines and Energy issues an exploration or production licence, he must enter into a petroleum agreement with the applicant.⁹⁰ A Model Petroleum Agreement (“**MPA**”) was published in 1998 and an updated one was published in 2007. In practice, the MPA is used as a starting point for negotiations between the Minister and the applicant. This agreement has various provisions dealing with the environment.

The Namibian EMA does not contain a standing provision similar to the one contained in the NEMA in South Africa. As a result, and especially in the light of the fact that a clean environment in terms of the Constitution is a non-justiciable right, the enforcement of a right to a clean environment is difficult in Namibia.

The provisions relating to standing in the NEMA go to greater lengths than the Namibian regulatory regime to ensure that the public’s right to a clean environment is protected. The NEMA recognises public interest litigation, while in Namibia the strict rules of standing still apply. Any person who wishes to enforce his right to a clean environment therefore has to show that he was personally aggrieved in some way.

⁸⁶ Section 32 of the NEMA.

⁸⁷ Section 32(1) of the NEMA.

⁸⁸ Section 32(1) of the NEMA.

⁸⁹ Petroleum (Exploration and Production) Act 2 of 1991 (“**Petroleum Act**”).

⁹⁰ Section 13(1) of the Petroleum Act.

A thorough discussion of the laws and regulations dealing with the environment is beyond the scope of this thesis. However, to illustrate how these provisions relating to the environment inform the regulatory regime for petroleum exploitation, the most important measures are discussed. Instead of discussing the acts themselves, the discussion is structured to follow the petroleum exploitation process.

2.4.2 Application for a Right to Petroleum

Application for a right to petroleum in South Africa and Namibia is brought under the MPRD Act and the Petroleum Act respectively. Both these acts require certain information regarding the environment when applying for a right to petroleum. Furthermore, the NEMA and the EMA are also applicable and require certain authorisations to be in place when a right to petroleum is granted. In doing so, the legislature in South Africa and Namibia requires all applicants to comply with certain clearly-defined requirements, thus statutorily enforcing the right of the people of the host nation to a clean environment.

2.4.2.1 South Africa

The South African Minister of Mineral Resources has a duty not grant a reconnaissance permit or production right if the reconnaissance or production operations will result in unacceptable pollution, ecological degradation or damage to the environment.⁹¹ In this respect, the rights of the host nation to a clean environment is elevated above the interests of the petroleum company. It also curbs the discretion of the Minister in favour of environmental interests. The MPRD Act recognises that petroleum should not be exploited at the cost of the environment. The same, however, is not stated in respect of an application for an exploration right. This is possibly an oversight. It may also be a deliberate omission, as exploration operations have less impact on the environment. This, however, does not explain why it is required in respect of reconnaissance operations, which have even less impact on the environment than exploration activities.⁹² The better view is that it is an oversight by the legislature, as

⁹¹ Section 75(1)(b) and section 84(1)(c) of the MPRD Act.

⁹² See for example Chapter Two and Chapter Seven above.

even exploration activities impact the environment.⁹³ Neither the MPRD Amendment Act 2008 nor the MPRD Amendment Bill 2012 addresses this issue.

Aside from the general provision above, applicants must also apply for environmental authorisations, issued in terms of NEMA, and compile work programmes in respect of their intended operations.⁹⁴ The regulatory framework in respect of the environmental aspects of petroleum exploitation therefore recognises the potential effects of petroleum exploitation on the environment. Through applicable legislation, applicants for rights to petroleum are required from the outset to consider the environmental impacts of their proposed operations.

The Minister of Environmental Affairs and Tourism has identified various activities which may not be undertaken without EA from the competent authority.⁹⁵ These activities include any activities that require a reconnaissance permit, except where such reconnaissance is done by means of a fly-over.⁹⁶ Activities requiring an exploration and production right are also included.⁹⁷ The NEMA therefore requires an applicant for a right to petroleum to have the necessary EA. The listed activities are linked to the type of activities that may be conducted and recognise that some, such as fly-over reconnaissance operations, do not affect the environment and therefore do not require an environmental authorisation.

Before the MPRD Amendment Act 2008 came into operation, no person could commence with any reconnaissance, exploration or production operations without an approved EMP.⁹⁸ The MPRD Amendment Act 2008, however, attempts to align the MPRD Act with NEMA by deleting all references in the MPRD Act to EMPs and instead using EA. An EA in terms of the MPRD Amendment Act 2008 has the meaning ascribed to it in NEMA. A new section is inserted in the MPRD Act⁹⁹ which

⁹³ Table 1.1 in Gao (note 2) at 5; Waskow and Welch (note 2) at 103.

⁹⁴ Regulation 18(2)(d), regulation 20(1)(d), regulation 28(2)(i), regulation 30(1)(h)(ii) and regulation 34(2)(h).

⁹⁵ Section 24(2) and section 24D of the NEMA and GNR 544, GN 545 and GN 546 of 18 June 2010, published in *Government Gazette* 33306.

⁹⁶ Item 23 of Listing Notice 2, GN 545 of 18 June 2010, published in *Government Gazette* 33306.

⁹⁷ Item 21 and item 22 of Listing Notice 2, GN 545 of 18 June 2010, published in *Government Gazette* 33306.

⁹⁸ Section 5(4)(a) of the MPRD Act.

⁹⁹ Section 5A of the MPRD Act.

states that no person may conduct reconnaissance operations or explore for or produce petroleum without an EA.¹⁰⁰ Any EMP approved under the MPRD Act before and at the time of coming into force of NEMA is deemed to have been approved and an EA issued in terms of NEMA.¹⁰¹

Two further new sections are inserted which deal with EAs.¹⁰² The first one states that the Minister of Mineral Resources is the responsible authority for implementing the environmental provisions in terms of NEMA insofar as it relates exploration and production activities or activities incidental thereto.¹⁰³ It does not state that the Minister is the responsible authority for implementing the environmental provisions of NEMA insofar as it relates to reconnaissance operations. This is likely an oversight by the legislature. See also the discussion of the intersection between the regulation of petroleum and environmental laws discussed above.¹⁰⁴ By making the Minister of Mineral Resources the competent authority in respect of environmental issues in relation to petroleum, there is a chance that the environmental obligations may be subjected to the Minister's primary obligation, being to develop the petroleum industry. This is further supported by the fact that the competent authority, in this case the Minister of Mineral Resources, has the power to grant or refuse the environmental authorisation.¹⁰⁵ However, the legislation is designed in such a way that the discretion of the Minister in respect of environmental issues is curbed by the fact that the Minister is obliged to give preference to the environment¹⁰⁶ and has to issue the environmental authorisation in line with the principles of NEMA.

EAs must be issued prior to the issuing of a right to petroleum.¹⁰⁷ Once again, this elevates the environmental concerns of petroleum operations above actual exploitation. If an EA is refused, no right to petroleum may be issued. The rights of the host nation to a clean environment is therefore placed above the interests of the petroleum

¹⁰⁰ Section 5 of the MPRD Amendment Act 2008.

¹⁰¹ Section 39B(1) of the MPRD Act.

¹⁰² Section 38A and 38B of the MPRD Act.

¹⁰³ Section 38A(1) of the MPRD Act.

¹⁰⁴ See 2.2 above.

¹⁰⁵ See the definition of "competent authority" in section 1 of the NEMA.

¹⁰⁶ Section for example 75(1)(b) and section 84(1)(c) of the MPRD Act and the discussion at the beginning of this paragraph.

¹⁰⁷ Section 38A(2) of the MPRD Act.

companies, whose interests may be profit-seeking rather than protecting the environment. When considering an application for an EA, the Minister of Mineral Resources may require an additional EMP.¹⁰⁸

The NEMA prescribes certain standard conditions attached to all EAs,¹⁰⁹ thus promoting transparency in respect of EAs and limiting the discretion of the decision maker. Every EA must ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.¹¹⁰ It must also ensure that the property or site where the activity is taking place is specified¹¹¹ and that provision is made for the transfer of rights and obligations when there is a change of ownership in the property.¹¹²

Notwithstanding the fact that the MPRD Act has done away with EMPs, the NEMA states that where application is made for an EA in respect of exploration or production and related activities on the exploration or production area, the Minister of Environment and Tourism and the Minister of Mineral Resources must require the submission of an EMP before considering an application for an EA.¹¹³ The NEMA describes in detail the information that must be contained in the EMP.¹¹⁴

Petroleum exploitation, even if all the necessary requirements in respect of the environment have been met or complied with, still has great impact on the environment. These operations also may take place on private land, thus causing damage to a private entity who needs assurance that the company will be in a position to rehabilitate the land once it has wrapped up its operations. The NEMA recognises this and requires that an applicant for an EA relating exploration, production or related activities on an exploration or production area must make financial provision for the rehabilitation,

¹⁰⁸ Section 24N(1) of the NEMA.

¹⁰⁹ Section 24E of the NEMA.

¹¹⁰ Section 24E(1) of the NEMA.

¹¹¹ Section 24E(2) of the NEMA.

¹¹² Section 24E(3) of the NEMA.

¹¹³ Section 24N(1A) of the NEMA.

¹¹⁴ Section 24N(1A) of the NEMA.

management and closure of environmental impacts. This must be done before the Minister of Mineral Resources issues the EA.¹¹⁵

Aside from EA and EMP, when applying for a reconnaissance permit, exploration right or production right, the applicant must submit a *work programme*, which must deal *inter alia* with the costs pertaining to the rehabilitation and management of environmental impacts.¹¹⁶ If the permit or right is awarded, the holder thereof must actively conduct operations in accordance with these programmes.¹¹⁷ This is not required for technical co-operation permits, which authorise desktop studies that have no impact on the environment.

Finally, under the MPRD Act, any person who applies for a production right must conduct an EIA.¹¹⁸ This is in line with international trends.¹¹⁹ An EIA, in terms of the MPRD Regulations, comprises a compilation of a scoping report followed by an EIA report.¹²⁰ The MPRD Regulations lists the scope and content of the scoping report and the EIA report.¹²¹

The same requirement is not listed for applicants for exploration rights or reconnaissance permits. The reason why an EIA is required from the applicant for a production licence is because production activities are much more intrusive on the environment than reconnaissance and exploration activities. However, this does not mean that these operations do not have any impact on the environment.

In South Africa, therefore, the legislation dealing with environmental aspects in respect of petroleum exploitation clearly sets out the environmental requirements that must be met by a person applying for a right to petroleum. By imposing through legislation, transparency is promoted. The importance of the interests of the host nation in a clean

¹¹⁵ Section 24P(1) of the NEMA.

¹¹⁶ Regulation 18(2)(d), regulation 20(1)(d), regulation 28(2)(i), regulation 30(1)(h)(ii), regulation 34(2)(h) and regulation 36(1)(h).

¹¹⁷ Section 75(5)(a), section 82(2)(b) and section 86(2)(b) of the MPRD Act.

¹¹⁸ Section 39(1) read with section 69(2) and 83(4) of the MPRD Act.

¹¹⁹ See 2.1. above.

¹²⁰ Regulation 48 of the MPRD Regulations.

¹²¹ Regulation 49 and regulation 50 of the MPRD Regulations.

environment is also emphasised from the application phase and is elevated above the interests of the petroleum company applying for the relevant right.

2.4.2.2 Namibia

The Petroleum Act of Namibia predates the EMA by sixteen years. Unlike the MPRD Act, the Petroleum Act does not incorporate the principles of EMA. Nevertheless, EMA contains provisions that ensure that this Act is applicable to the petroleum industry.

An application for a reconnaissance or exploration licence or the renewal of such a licence must set out an estimate of the effect which the proposed operations may have on the environment.¹²² An application for a production licence not only requires an estimation of the significant effect of the production operations on the environment, but must also set out how the company intends to control or limit the effect of the production operations on the environment.¹²³ Here, the South African framework differs from its Namibian counterpart. In South Africa, it is clearly stated that a right to petroleum may not be granted if it will result in unacceptable pollution, ecological degradation or damage to the environment. In Namibia, this is not the case. An applicant is only required to estimate what the significant effect of the operations will be on the environment – even if they are substantial, the legislation makes provision that a licence may still be granted. The same emphasis is therefore not placed on the interests of the host nation as in South Africa.

Aside from the information required in an application for a petroleum licence, there are other authorisations that must be obtained or steps that must be followed which pertain to the environment. As with South Africa, an EA (in Namibia an environmental clearance certificate, or ECC) and EIAs are prescribed. Namibia does not require work programmes setting out the environmental impact of petroleum operations, but unlike South Africa a petroleum agreement must be signed with the state, which deals extensively with environmental aspects of petroleum operations.

¹²² Section 24(1)(c)(iii), section 25(1)(c)(iii), section 32(1)(c)(iii) and section 33(1)(c)(iii) of the Petroleum Act.

¹²³ Section 46(2)(i)(vii) of the Petroleum Act.

2.4.2.2.1 Environmental Clearance Certificate (ECC) and EIAs

The EMA states that the Minister may, after following the prescribed consultative process, list activities¹²⁴ which may not be undertaken without an ECC.¹²⁵ Failure to obtain an ECC amounts to an offence and may lead to a fine or imprisonment or both.¹²⁶ A competent authority may not issue an authorisation unless the person proposing to undertake the listed activity (“**proponent**”) has obtained an ECC in terms of the EMA.¹²⁷ Any authorisation issued where the proponent does not hold an ECC is invalid.¹²⁸

The first question that has to be asked, therefore, is whether a person intends undertaking a listed activity. If the activity that the person intends to undertake is not listed, no ECC is required. If, however, the activity is listed, it is necessary to obtain an ECC before commencing with the activity.¹²⁹ The listed activities are far reaching and will not be discussed in detail here. For purposes of this thesis, it is sufficient to note that mining or the extraction of any natural resources, whether regulated by law or not, requires a clearance certificate.¹³⁰ Furthermore, any resource extraction, manipulation, conservation and related activities also require a clearance certificate.¹³¹ Finally, the extraction or processing of gas from natural and non-natural sources, including gas from landfill sites, requires a clearance certificate.¹³²

In terms of the EMA, therefore, if the petroleum licence a company intend applying for will trigger one of the listed activities, you will first need to obtain ECC before the Minister of Mines and Energy can grant you the licence.¹³³ The result is therefore the same as in South Africa – the principles of EMA are for all practical purposes

¹²⁴ “Activity” means a physical work that a proponent proposes to construct, operate, modify, decommission or abandon or an activity that a proponent proposes to undertake. Section 1 of the EMA.

¹²⁵ Section 27(1) and section 27(3) of the EMA.

¹²⁶ Section 27(4) of the EMA.

¹²⁷ Section 31(1) of the EMA.

¹²⁸ Section 31(2) of the EMA.

¹²⁹ Section 27(3) of the EMA.

¹³⁰ Item 3.2 of GN 29 of *Government Gazette* 4878 of 06 February 2012.

¹³¹ Item 3.3 of GN 29 of *Government Gazette* 4878 of 06 February 2012.

¹³² Item 3.4 of GN 29 of *Government Gazette* 4878 of 06 February 2012.

¹³³ In practice, this does not happen. The Minister of Mines and Energy grants and issues a licence to an applicant before the applicant has acquired an ECC. Only after the applicant has been awarded a licence, will the applicant apply for environmental clearance.

incorporated in the Petroleum Act. An important difference between South Africa and Namibia is, however, that in terms of NEMA the competent authority issues the environmental authorisation. In Namibia, however, although the Minister of Mines and Energy is the competent authority, the ECC is still issued by the Minister of Environment and Tourism. This removes the possibility that the competent authority may subject environmental obligations to his primary objective, namely promotion of the petroleum industry.

It is unclear under Namibian law whether applicants for exploration or reconnaissance licences must obtain an ECC. The nature of reconnaissance operations¹³⁴ is such that it will not trigger a listed activity as these operations do not require resource extraction, manipulation or related activities. It is not that clear in respect of exploration activities. Exploration operations are operations aimed at searching for petroleum and do not entail resource extraction or manipulation. However, in terms of an exploration licence, the holder thereof is entitled to remove petroleum samples. The question is whether this will amount to resource extraction or manipulation and whether this will trigger one of the listed activities. One may argue that the listed activities are couched in such broad terms that they envisage exploration operations as well. Furthermore, in practice it is typically a condition of an exploration licence that an ECC must be obtained. This seems to indicate that the Minister of Mines and Energy in Namibia considers exploration operations to have a substantial impact on the environment and therefore requires environmental clearance

Application for an ECC must be lodged with the Minister of Mines.¹³⁵ The proponent must designate an environmental assessment practitioner (“EAP”) to manage the assessment process.¹³⁶ After submitting an application for an ECC, the proponent must conduct a public consultation process,¹³⁷ which process must be completed within 21 days.¹³⁸ This process must be conducted regardless of whether an assessment may be

¹³⁴ See Chapter Five above.

¹³⁵ This does not happen in practice, where it is lodged with the Environmental Commissioner directly.

¹³⁶ Regulation 3(a) of the EIA Regulations, GN 30 of *Government Gazette* 4878 of 06 February 2012.

¹³⁷ Regulation 7(1)(a) of the EIA Regulations.

¹³⁸ Regulation 21(7) of the EIA Regulations.

required. The proponent must open and maintain a register of all interested and affected parties in respect of the application.¹³⁹ After submission of an application for an ECC, the proponent must prepare a scoping report¹⁴⁰ and give all interested and affected parties an opportunity to comment on the scoping report.¹⁴¹ The public is therefore given an opportunity to make representations, which is important to ensure that their rights are protected. It is also important considering that Namibia does not place a duty on an applicant or the government to consult with the public when application for a right to petroleum is made.¹⁴²

After completing the public consultative process and preparing the scoping report, the proponent must submit to the relevant competent authority the scoping report and the management plan.¹⁴³ The proponent must also submit copies of any representations, objections and comments received in connection with the application or the scoping report, copies of the minutes of any meetings held by the proponent with interested and affected parties and other role players which record the views of the participants and any responses by the EAP to those representations, objections, comments and views.¹⁴⁴ The competent authority must then in the prescribed manner forward the application to the Environmental Commissioner, if the proponent complies with any requirements prescribed by law in respect of that activity.¹⁴⁵

The Commissioner must, within the prescribed time (14 days of receipt of application),¹⁴⁶ decide whether the proposed activity requires an EIA.¹⁴⁷ If the Commissioner decides that an EIA is needed, an extensive and interactive process must be followed.¹⁴⁸ If the Commissioner decides that the proposed activity does not require an EIA, the Commissioner may grant the application and, on payment of the prescribed

¹³⁹ Regulation 7(1)(b) of the EIA Regulations.

¹⁴⁰ Regulation 7(1)(d) of the EIA Regulations.

¹⁴¹ Regulation 7(1)(e) of the EIA Regulations.

¹⁴² See Chapter Five above.

¹⁴³ Regulation 7(2) of the EIA Regulations.

¹⁴⁴ Regulation 7(2) of the EIA Regulations.

¹⁴⁵ Section 32(2) of the EMA.

¹⁴⁶ Regulation 12(1)(d) of the EIA Regulations.

¹⁴⁷ Section 33(1) of the EMA.

¹⁴⁸ Section 35 to section 37 of the EMA; regulation 14 to regulation 18 of the EIA Regulation.

fee, issue an ECC to the proponent¹⁴⁹ or refuse the application, in which case the Commissioner must give reasons for the refusal.¹⁵⁰

The Commissioner must determine the scope of the EIA and the procedures and methods for conducting the EIA.¹⁵¹ The Commissioner must then in writing notify the applicant that an EIA of the proposed activity is required to be carried out and prepared by the applicant, at the applicant's own expense and in accordance with the scope, procedures and methods determined by the Commissioner.¹⁵² The proponent must instruct the EAP to prepare an EIA report within 21 days of receipt of a notification to prepare an EIA.¹⁵³ On the completion of the EIA report the proponent must submit the report to the Environmental Commissioner.¹⁵⁴ If it appears to the Commissioner that the prescribed requirements in respect of the contents of the EIA report have been complied with, the Commissioner must at the cost of the proponent, notify the application and EIA report in the prescribed manner or direct the proponent to notify the application in the prescribed manner.¹⁵⁵

The Commissioner must review the application within a reasonable time after the closing date for submissions.¹⁵⁶ Within seven days of reviewing the application, the Commissioner must notify the proponent and the competent authority of his decision.¹⁵⁷ The Commissioner may grant the application and, on payment of the prescribed fee, issue an ECC to a proponent.¹⁵⁸ The Minister may also refuse the application and provide the proponent with reasons for the refusal.¹⁵⁹ The Minister must, within the prescribed time and in the prescribed form and manner, notify the proponent of the decision made and, if the application is granted, provide the proponent with the ECC.¹⁶⁰

¹⁴⁹ Section 34(1)(a) of the EMA.

¹⁵⁰ Section 34(1)(b) of the EMA.

¹⁵¹ Section 35(1)(a) of the EMA.

¹⁵² Section 35(1)(b) of the EMA; Regulation 14(a) of the EIA Regulations.

¹⁵³ Regulation 15(1) of the EIA Regulations.

¹⁵⁴ Regulation 15(3) of the EIA Regulations.

¹⁵⁵ Section 35(6) of the EMA; Regulation 16(1)(b) of the EIA Regulations.

¹⁵⁶ Section 36(1) of the EMA.

¹⁵⁷ Regulation 18(a) of the EIA Regulations.

¹⁵⁸ Section 37(1)(a) of the EMA; Regulation 18(b) of the EIA Regulations.

¹⁵⁹ Section 37(1)(b) of the EMA.

¹⁶⁰ Section 37(2) of the EMA.

Notwithstanding the discretion granted to the Commissioner to require an applicant to conduct an EIA, once the Minister of Mines and Energy has received an application for a petroleum licence, he may, to consider the application, require the applicant to carry out an EIA.¹⁶¹ Once again, this is a discretion conferred upon the Minister of Mines and Energy to require an applicant to conduct an EIA.

A petroleum licence may not be issued unless a clearance certificate has been granted.¹⁶² In this regard, the Namibian and South African systems are the same. By prioritising the EA or ECC, the interests of the host nation in respect of a clean environment are recognised and elevated above that of the petroleum company. This ensures that the rights of the people in respect of a clean environment are respected and also provides grounds for accountability if the requirements have not been met.

2.4.2.2.2 The Petroleum Agreement

The relationship between the state and the holder of an exploration or production licence is not only dealt with under the Petroleum Act and the licence, but also in terms of the petroleum agreement.¹⁶³ Before the Minister issues an exploration or production licence, the company applying for the licence must negotiate and sign a petroleum agreement with the state.¹⁶⁴ The MPA deals with environmental protection¹⁶⁵ and states that the holder must conduct its petroleum operations in a manner likely to conserve the natural resources of Namibia and protect the environment.¹⁶⁶ This clause of the MPA may be criticised, as it is unclear as to what exactly is expected from the holder. More context or guidance should be given to a holder to enable it to conduct its petroleum operations in a manner likely to conserve the natural resources of Namibia and protect the environment.

¹⁶¹ Section 12(2)(b)(i) of the Petroleum Act. See also Koep PF and Van den Berg HM “Mining and Energy Law in Namibia” in Ruppel OC and Ruppel-Schlichting K (eds) *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life*, (2013) Windhoek OrumbondePress.na & Welwitschia Verlag Dr. A. Eckl, Essen at 187.

¹⁶² Section 31(1) of the EMA.

¹⁶³ See Chapter Five above.

¹⁶⁴ Section 13(1) of the Petroleum Act.

¹⁶⁵ Clause 11 of the MPA.

¹⁶⁶ Clause 11.2(a) of the MPA.

The holder must furthermore in terms of the MPA employ the best available techniques in accordance with good oilfield practices¹⁶⁷ for the prevention of environmental damage¹⁶⁸ to which its petroleum operations might contribute and for the minimisation of the effect of such operations on adjoining or neighbouring lands.¹⁶⁹ The holder must also implement the proposals contained in its development plan regarding the prevention of pollution, the treatment of wastes, the safeguarding of natural resources and the progressive reclamation and rehabilitation of lands disturbed by petroleum operations.¹⁷⁰

The holder undertakes, for purposes of the MPA, to take all reasonable, necessary and adequate steps in accordance with good oilfield practices to minimise environmental damage to the licence area and adjoining or neighbouring lands.¹⁷¹ If the holder fails to comply with this provision, or contravenes any law on the prevention of environmental damage, and such failure or contravention results in environmental damage, the holder must take all necessary and reasonable measures to remedy such failure or contravention and the effects thereof.¹⁷² These measures and methods must be determined in timely consultation with the Minister upon the commencement of petroleum operations or whenever there is a significant change in the scope or method of carrying out petroleum operations. The holder must take into account the international standards applicable in similar circumstances and the relevant environmental impact assessment studies carried out in accordance with the MPA. The holder must notify the Minister in writing of the nature of the measures and methods finally determined by the holder and must cause such measures and methods to be reviewed from time to time in view of prevailing circumstances.¹⁷³ These obligations on the holder are all very broad without much content and it is uncertain exactly how

¹⁶⁷ “Good Oilfield Practices” means “any practices which are generally applied by persons involved in the exploration or production of petroleum in other countries of the world as good, safe, efficient and necessary in the carrying out of exploration operations or production operations”. See Section 1 of the MPA and Section 1 of the Petroleum Act. See also paragraph 3.3.2.2. below for the criticism on “good oilfield practices”.

¹⁶⁸ “Environmental Damage” includes “any damage or injury to, or destruction of, soil or water or any plant or animal life, whether in the sea or in any other water or on, in or under land.”

¹⁶⁹ Clause 11.2(b) of the MPA.

¹⁷⁰ Clause 11.2(c) of the MPA.

¹⁷¹ Clause 11.3 of the MPA.

¹⁷² Clause 11.4 of the MPA.

¹⁷³ Clause 11.6 of the MPA.

they should be enforced. Because of the infant nature of the petroleum industry in Namibia, it is also uncertain how these clauses are applied in practice.¹⁷⁴

The holder must cause a person or persons, approved by the Minister on account of their special knowledge of environmental matters, to carry out two EIA studies. These studies must be carried out to determine the prevailing situation relating to the environment, human beings, wildlife or marine life in the licence area and in the adjoining or neighbouring areas at the time of the studies.¹⁷⁵ The EIAs are also carried out to establish what the effect will be on the environment, human beings, wildlife or marine life in the licence area in consequence of the petroleum operations to be made under the MPA, and to submit for consideration by the parties to the MPA, measures and methods for minimising environmental damage and carrying out site restoration in the licence area.¹⁷⁶ By requiring two EIAs, the MPA seems to be more strict than the regulatory framework in South Africa. However, since the petroleum agreement is subject to negotiation between the Minister and the holder, these conditions may be excluded.

The procedure applicable to the EIAs, including the phases in which it must be carried out and information relating to the guidelines it must contain is dealt with in detail in the MPA.¹⁷⁷ Furthermore, the holder's obligations in respect of the environment in every phase of its operations are determined in the MPA, including the holder's duty to report to the Minister of Mines and Energy at various stages of its operations and the holder's duty to establish a trust fund for purpose of decommissioning.¹⁷⁸

The holder must ensure that petroleum operations are carried out in an environmentally acceptable and safe manner consistent with good oilfield practices and that such operations are properly monitored.¹⁷⁹ The pertinent completed EIA studies must be made available to its employees and to its contractors to develop adequate and proper

¹⁷⁴ See for example Gao (note 2) at 13; Havemann (note 9) at 235.

¹⁷⁵ Clause 11.7(a) of the MPA.

¹⁷⁶ Clause 11.7(b) of the MPA.

¹⁷⁷ Clause 11.8 to clause 11.10 of the MPA.

¹⁷⁸ Clause 11.12 to clause 11.17 of the MPA.

¹⁷⁹ Clause 11.11 of the MPA.

awareness of the measures and methods of environmental protection to be used in carrying out its petroleum operations.¹⁸⁰

Finally, any agreement entered into between the holder and its contractors relating to its petroleum operations shall include the terms set out in the MPA and any established measures and methods for the implementation of the Company's obligations in relation to the environment under the MPA.¹⁸¹ This ensures a wider application of the provisions of the MPA to the benefit of the environment.

2.4.2.3 Assessment

A major difference between Namibia and South Africa is that, in South Africa, the Minister of Mineral Resources may not grant a right to petroleum if the operations will result in unacceptable pollution, ecological degradation or damage to the environment, while in Namibia this is not stated. By curtailing the state's powers in granting rights to petroleum in this way, the interests of the host nation in a clean environment is emphasised in South Africa and elevated above the interests of the petroleum company. This is not the case in Namibia.

In South Africa and Namibia, the Ministers responsible for the environment have identified petroleum operations as "listed activities" which require an EA (in Namibia an ECC).¹⁸² Before the holder of a right to petroleum is entitled to exercise those rights, he must obtain the necessary EA. These EAs must be issued before the right to petroleum is issued. By making this EA a prerequisite of petroleum exploitation, both countries emphasise the importance of environmental protection in petroleum exploitation.

EAs in South Africa are granted or refused by the Minister of Mineral Resources, while in Namibia the granting of ECCs remains the competency of the Minister of Environment and Tourism. By vesting the power to grant EA in the Minister of

¹⁸⁰ Clause 11.11 of the MPA.

¹⁸¹ Clause 11.11 of the MPA.

¹⁸² The identification (or listing) of petroleum operations as having a potential impact on the environmental and requiring clearance is in line with international practice. For example, the EU Council Directive 85/337/EEC of 27 June 1985 follows the same trend. See Gordon (note 34) at 81.

Mineral Resources – whose primary objective is the promotion of the petroleum industry and not the environment – the legislature has created a risk that environmental obligations may be subjected to the promotion of the petroleum industry. This risk is somewhat curtailed by the obligation on the Minister not to grant a right to petroleum if the operations will result in unacceptable pollution, ecological degradation or damage to the environment. This risk is eliminated in Namibia, where the power to grant ECCs remains vested in the Minister of Environment and Tourism.

Both regimes follow international trend by requiring EIAs in respect of petroleum exploitation,¹⁸³ although in South Africa, EIA are only required to be conducted by persons applying for production rights. The reason for this is probably that production activities have a much greater impact on the environment than reconnaissance or exploration activities; this does not mean that reconnaissance and exploration operations do not have any impact on the environment.

In Namibia, the legislation does not specifically require an EIA in respect of any of the licences. However, if the holder is obliged to apply for an ECC, the Environmental Commissioner may require the holder to conduct an EIA. When the Minister of Mines and Energy receives an application for a licence, he may also require the applicant to conduct an EIA. Here, however, both the Environmental Commissioner and the Minister have discretion to compel an applicant to conduct an EIA. It is submitted that to ensure that the environmental right is given effect to, EIAs should be compulsory in all applications where the proposed activities may have an environmental impact.

Namibia has gone one step further than South Africa with regard to the environmental responsibilities of applicants. The petroleum agreement that the applicant has to enter into with the state has various provisions relating to the applicant's duties in respect of the environment. The provisions of the petroleum agreement apply over and above the provisions of the Petroleum Act and the EMA. For example, it obliges the holder to comply with good oilfield practices as applicable in other countries, as well as other international standards. This international dimension given to applicants in Namibia provides more context to the content of access to petroleum in Namibia than in South

¹⁸³ See for example Glazewski and Du Toit (note 35) at 10-2.

Africa. On the other hand, South Africa requires an applicant for all rights to petroleum to compile a work programme, which *inter alia* deals with the costs of rehabilitation and the management of environmental impacts. A similar requirement is not present in the Namibian system.

By legislating the obligations of applicants in respect of the environment, the relevant legislation provides transparency as to what is expected of holders in respect of the environment. Persons who wish to enforce any rights in respect of the environment may rely on the legislation for certainty. This also promotes accountability – if the state or the holder applicant does not comply with the prescribed requirements and an EA is awarded in any event (or a permit, right or licence to petroleum), the decision to award such an authorisation may be taken on review on the ground of legality.¹⁸⁴

A problem arises, however, in Namibia in respect of the obligations contained in the petroleum agreement. The MPA is typically used in practice, but they remain contracts open to negotiation between the parties. Once an agreement has been signed, this agreement is not made available to the public and other interested persons therefore do not have insight into the final provisions agreed upon. Furthermore, the obligations in terms of the MPA are couched in wide terms and cause uncertainty as to what exactly is expected from holders. Although reference is made to international practices, this by itself is problematic as international practices differ and are also subject to criticism.¹⁸⁵

2.4.2 Exercising the right to petroleum

Once a right to petroleum has been granted, the holder of the right has to adhere to the terms and conditions attached to this right. These include terms and conditions relating to the environment. This ensures continuance compliance with environmental obligations, which operates in favour of the interests of the people.

In both jurisdictions, the holder of a right to petroleum is responsible for any damage caused to the environment. In South Africa, however, most obligations on holders are imposed in terms of NEMA, while in Namibia these obligations are imposed by the Petroleum Act.

¹⁸⁴ See Chapter Nine below.

¹⁸⁵ Gao (note 2) at 13; Havemann (note 9) at 235.

The NEMA ensures continuous compliance with environmental obligations by placing various obligations on holders of right to petroleum in respect of the environment. This promotes the interests of the people of South African in respect of the environment.

A holder of a reconnaissance, exploration or production right must actively conduct operations in accordance with the work program that the applicant submitted when applying for the right.¹⁸⁶ Furthermore, a holder must also adhere to the terms and conditions of attached to the right, the provisions of the MPRD Act and any other law.¹⁸⁷

Holders of an EA (which includes all holders of rights to petroleum) must at all times give effect to the general objectives of integrated environmental management, laid down in NEMA.¹⁸⁸ Holders must consider, investigate, assess and communicate the impact of its exploration and production activities on the environment.¹⁸⁹ Holders must manage all environmental impacts in accordance with its approved EMP (if one was required) and as an integral part of its exploration or production operations, unless the Minister of Mineral Resources directs otherwise.¹⁹⁰ Holders must also monitor and audit compliance with the requirements of the environmental management programme.¹⁹¹ Finally, holders are responsible for any environmental damage, pollution, pumping and treatment of extraneous water or ecological degradation as a result of its exploration or production operations or related activities which may occur inside and outside the boundaries of the area to which its right relates.¹⁹²

Every holder must annually assess its environmental liability and must adjust the financial provision made for remediation of environmental damage, if required and to the satisfaction of the Minister of Mineral Resources.¹⁹³ This is in line with the internationally accepted environmental management tools, discussed above. If any

¹⁸⁶ Section 75(5)(a), section 82(2)(b) and section 86(2)(b) of the MPRD Act.

¹⁸⁷ Section 75(5)(b), section 82(2)(c) and section 86(2)(c) of the MPRD Act.

¹⁸⁸ Section 24N(7)(a) of the NEMA. The principles of integrated environmental management are set out in section 23 of the NEMA.

¹⁸⁹ Section 24N(7)(b) of the NEMA.

¹⁹⁰ Section 24N(7)(c) of the NEMA.

¹⁹¹ Section 24N(7)(d) of the NEMA.

¹⁹² Section 24N(7)(f) of the NEMA.

¹⁹³ Section 24P(3) of the NEMA.

holder fails to manage any impact on the environment or is unable to manage such impact, the Minister of Mineral Resources may, on written notice to the holder, use all or part of the financial provision to manage the environmental impact of the holder's exploration or production operations.¹⁹⁴

Aside from the above, it is also part of the general terms and conditions of EAs that every holder must conduct such monitoring and such performance assessment of the approved environmental management programme as may be prescribed.¹⁹⁵ The purpose of this is to ensure compliance with the conditions of the EA and to assess the continued appropriateness and adequacy of the EMP.¹⁹⁶

The continuous annual assessment of environmental liability is an important obligation placed on holders. Because of the potential length of petroleum exploitation projects, it is necessary for holders to comply with this in order not to lose sight of his environmental obligations. It also ensures that the state, who is ultimately in charge of controlling the impact of petroleum exploitation on the environment, can adequately manage the activities of holders.

The Petroleum Act regulates the obligations of holders of petroleum licences in respect of the environment in much more detail than in South Africa. The Namibian Minister of Mines and Energy may, having due regard to good oilfield practices, give directions to the holder of a licence in respect of the prevention of the spillage of substances (including water and drilling fluid) extracted from a well drilled for purposes or in connection with reconnaissance operations, exploration operations or production operations, or substances used in relation to the drilling of such a well.¹⁹⁷ The invocation of "good oilfield practices" has been criticized as being "simplistic and vague" as it has no binding definition and does not indicate where such practices may be found.¹⁹⁸ The same criticism apply in respect of Namibia as, despite defining what is meant by "good oilfield practices", no indication is given as to where these practices are applied.

¹⁹⁴ Section 24P(2) of the NEMA.

¹⁹⁵ Section 24Q of the NEMA.

¹⁹⁶ Section 24Q of the NEMA.

¹⁹⁷ Section 21(1)(d) of the Petroleum Act.

¹⁹⁸ Gao (note 2) at 13; Havemann (note 9) at 235.

The Petroleum Act is silent as to the terms and conditions relating to the environment applicable to the holder of a reconnaissance licence. As stated above, however, an application for a reconnaissance licence must set out the possible effect that reconnaissance operations will have on the environment. The Minister may attach whatever condition to the licence as he deems necessary. These may relate to the environment as well.

The Petroleum Act imposes various obligations relating to the environment on the holder of exploration and production licences. The holder of an exploration or production licence has an obligation carry out exploration and production operations in the exploration or production area in accordance with good oilfield practices.¹⁹⁹ The holder must also control the flow and prevent the waste, escape or spilling in the exploration area of petroleum, water or any gas.²⁰⁰ Further, the holder must prevent the waste or spilling in the exploration or production area of substance (including water and drilling fluid) extracted from a well drilled for purposes of or in connection with exploration or production operations or used in relation to the drilling of such a well.²⁰¹ The holder must prevent damage to petroleum-bearing strata in any area outside the exploration area²⁰² and prevent petroleum reservoirs in the exploration and production area or water sources from being connected with each other.²⁰³

The holder of an exploration or production licence must prevent water or any other substance entering any petroleum reservoir through the wells in the exploration area, except if required by, and in accordance with, good oilfield practices.²⁰⁴ The holder must also prevent the pollution of any aquifer, estuary, harbour, lake, reservoir, river, spring, stream, borehole and all other areas of water by the spilling of petroleum, drilling fluid, chemical additive, any gas or any waste product or effluent.²⁰⁵

Prior to the drilling of any well, the holder must furnish the Petroleum Commissioner with a report containing particulars of the technique to be employed, an estimate of the

¹⁹⁹ Section 38(1)(a) of the Petroleum Act. See also Koep and Van den Berg (note 161) at 187–190.

²⁰⁰ Section 38(2)(a) of the Petroleum Act.

²⁰¹ Section 38(2)(b) of the Petroleum Act.

²⁰² Section 38(2)(c) of the Petroleum Act.

²⁰³ Section 38(2)(d) of the Petroleum Act.

²⁰⁴ Section 38(2)(e) of the Petroleum Act.

²⁰⁵ Section 38(2)(f) of the Petroleum Act.

time to be taken, the material to be used and the safety measures to be employed in the drilling of such well.²⁰⁶ The holder may not flare any combustible gas, except for purposes of testing such gas, or for operational reasons, or with the approval of the Minister and in accordance with such terms and conditions as may be determined by the Minister.²⁰⁷ Finally, a holder may not abandon, close or plug a well without the approval of the Minister.²⁰⁸

In Namibia, the Minister may, in consultation with the Minister of Fisheries and Marine Resources and the Minister of Environment and Tourism, exempt holders of exploration or production licences from the above provisions.²⁰⁹ The Minister may determine the period for which and the conditions subject to which the exemption is granted.²¹⁰ This discretion of the Minister is not conducive towards a petroleum regulatory regime that respects peoples' right to a clean environment. This in turn reduces accountability on the part of the state as well; by granting the Minister a discretion instead of imposing certain obligations on the Minister, the EMA reduces the scope for holding the Minister accountable.

When in the course of production operations carried out under a production licence any petroleum or other substances are spilled or any pollution is caused, the holder of such production licence report it to the Minister of Mines and Energy. This must be done as soon as possible and the holder must take, at its own costs, all such steps as may be necessary in accordance with good oilfield practices or otherwise as may be necessary to remedy it.²¹¹ If the holder fails to do so, the Minister may order the holder to take such necessary steps to remedy the spilling, pollution or damage or loss. This must be done by means of written notice addressed to the holder. If the holder fails to comply with the directions of the Minister, the Minister may cause the necessary steps to be

²⁰⁶ Section 38(2)(g) of the Petroleum Act.
²⁰⁷ Section 38(2)(h) of the Petroleum Act.
²⁰⁸ Section 38(2)(i) of the Petroleum Act.
²⁰⁹ Section 38(2A)(a) of the Petroleum Act.
²¹⁰ Section 38(2A)(a) of the Petroleum Act.
²¹¹ Section 71(1) of the Petroleum Act.

taken to remedy such spilling, pollution or damage or loss. All costs incurred by the Minister must be recovered from the holder by the Minister through a competent court.²¹²

In 1999, regulations relating to the health, safety and welfare of persons employed, and protection of other persons, property, the environment and natural resources in, at or in the vicinity of exploration and production areas (“**Petroleum Regulations**”) were published.²¹³ These regulations were made by the Minister of Mines and Energy, acting in consultation with the Minister of Fisheries and Marine Resources and the Minister of Environment and Tourism. The Petroleum Regulations regulate, *inter alia*, electricity, fires and explosions, transport (including transport of hazardous substances), subsea operations, emergency preparedness (including pollution by spilling of petroleum) and safety zones.

If the Minister has reason to believe that any works or installations erected by the company or any operations carried out by the company are endangering or may endanger persons or any property of any other person, the Minister may require the company to take reasonable remedial measures within such reasonable period as may be determined by the Minister. The Minister may furthermore require the holder to take reasonable and appropriate steps to repair any damage to the environment. This also applies in respect of any works, installations or operations which the Minister has reason to believe is causing pollution or is harming wildlife or the environment. If the Minister deems it necessary, he may require the company to discontinue petroleum operations in whole or in part until the company has taken such remedial measures or has repaired any damage.

It is obvious from the above discussion that in South Africa, the holder is obliged to comply with the work programme, which deals *inter alia* with the environmental impacts of petroleum operations. In Namibia, the holder must comply with good oilfield practices applicable in other countries. Once again, this gives an international flavour to the Namibian legislation which is absent in South Africa. However, this “international dimension” may be subject to criticism as it is vague.

²¹² Section 71(2) of the Petroleum Act.

²¹³ GN 190 of *Government Gazette* 2188 of 23 September 1999. See also Koep and Van den Berg (note 161) at 190.

As with *applicants* for rights to petroleum, the obligations imposed on *holders* of rights to petroleum are legislated and therefore provide transparency into what is expected of holders. It also promotes accountability, as holders and citizens know what obligations are imposed on rights to petroleum and what the role of the state is enforcing these rights. In Namibia, however, some of these provisions are negotiable in the petroleum agreement to which the public does not have insight. There is therefore a lack of transparency and accountability in Namibia.

2.4.3 Rehabilitation, Production Closure and Decommissioning

As stated in Chapter Two above, decommissioning refers to the “wrapping-up” of upstream petroleum exploitation.²¹⁴ Rehabilitation of the production area is one of the steps of decommissioning. Across the globe, the law relating to decommissioning is still evolving.²¹⁵ South Africa and Namibia have scant regulation of the final stages of production.

The South African legislation distinguishes between rehabilitation on the one hand and decommissioning and production closure on the other hand. The main difference is that rehabilitation takes place throughout the exploration and production operations, while decommissioning and production close takes place at the end of exploration and production operations.

A reconnaissance work program, exploration work program and production work program must contain and estimate of the expenditure to be incurred, which must include inter alia costs pertaining to the rehabilitation of environmental impacts.²¹⁶ Furthermore, application for renewal of an exploration or production right must be accompanied by a report reflecting the extent of compliance with the requirements of

²¹⁴ See Chapter Two above.

²¹⁵ Altit F and Igiehon M "Decommissioning of Upstream Oil and Gas Facilities" in G Picton-Turbervill (ed) *Oil and Gas: A Practical Handbook* (2009) London, Globe Business Publishing Ltd at 268.

²¹⁶ Regulation 20(1)(d) of the MPRD Regulations.

the environmental management program or plan, the rehabilitation to be completed and the estimated costs thereof.²¹⁷

Quarterly and annual reports submitted in respect of exploration operations must include a statement reflecting rehabilitation work completed and the rehabilitation work uncompleted.²¹⁸ The same reporting requirements do not exist for holders of production licences.²¹⁹

The production closure programme (discussed below) must include a summary of the results of progressive rehabilitation undertaken.²²⁰ It is a principle of production closure that, after production operation ceases, the holder the land is rehabilitated, as far as is practicable, to its natural state, or to a predetermined and agreed standard or land use which conforms with the concept of sustainable development.²²¹

In terms of the NEMA, a holder of an environmental authorisation must, as far as is reasonably practicable, rehabilitate the environment affected by the exploration or production operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.²²² If any holder fails to rehabilitate any impact on the environment or is unable to rehabilitate such impact, the Minister of Mineral Resources may, on written notice to the holder, use all or part of the financial provision to manage the environmental impact of the holder's exploration or production operations.²²³

The MPRD Act and NEMA do not specifically mention decommissioning. The MPRD Regulations on the other hand discusses decommissioning in the context of production closure and state that a production closure plan must contain a description of the

²¹⁷ Section 81(2)(c) and section 85(2)(c) of the MPRD Act. The reference to environmental management programme in respect of application for renewal of exploration licences is deleted by the MPRD Amendment Act to refer to the environmental authorisation and reference to the rehabilitation to be completed and the estimated costs thereof is deleted. See section 59(a) of the MPRD Amendment Act. This section will come into operation on 07 December 2014. The same amendment does not apply in respect of applications for renewal of production rights.

²¹⁸ Regulation 31(3)(v) and regulation 31(4)(v) of the MPRD Regulations.

²¹⁹ See also Chapter Five above.

²²⁰ Regulation 62(e) of the MPRD Regulations.

²²¹ Regulation 56(e) of the MPRD Regulations.

²²² Section 24N(7)(e) of the NEMA.

²²³ Section 24P(2) of the NEMA.

methods to decommission each exploration or production component and the mitigation or management strategy proposed to avoid, minimise and manage residual or latent impacts.²²⁴ In this way, decommissioning is linked back to the MPRD Act and the NEMA, as both also deal with production closure. The holder of an exploration or production right must ensure that the closure of exploration or production operations incorporate a process which must start at the commencement of the operation and continue throughout the life of the operation.²²⁵ The holder must also ensure that risks pertaining to environmental impacts must be quantified and managed pro-actively.²²⁶ This includes gathering relevant information throughout the life of an exploration or production operation.²²⁷ The holder must also ensure that the safety and health requirements in terms of the Mine Health and Safety Act²²⁸ are complied with,²²⁹ that residual and possible latent environmental impacts are identified and quantified²³⁰ and that exploration or production operations are closed efficiently and cost effectively.²³¹ Finally, the holder must ensure that the land is rehabilitated, as far as practical, to its natural state or to a predetermined and agreed standard or land use which conforms with the concept of sustainable development.²³²

Under the MPRD Act and NEMA, the holder of an exploration or production right remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure of production. This responsibility remains with the holder until the Minister has issued a closure certificate under the MPRD Act to the holder concerned.²³³ The holder may, however, apply in writing to the Minister for the transfer of the environmental liabilities and

²²⁴ Regulation 47 read with regulation 62(f) of the MPRD Regulations.
²²⁵ Regulation 47 read with regulation 56(a) of the MPRD Regulations.
²²⁶ Regulation 47 read with regulation 56(b) of the MPRD Regulations.
²²⁷ Regulation 47 read with regulation 56(b) of the MPRD Regulations.
²²⁸ Mine Health and Safety Act 29 of 1996.
²²⁹ Regulation 47 read with regulation 56(c) of the MPRD Regulations.
²³⁰ Regulation 47 read with regulation 56(d) of the MPRD Regulations.
²³¹ Regulation 47 read with regulation 56(f) of the MPRD Regulations.
²³² Regulation 47 read with regulation 56(e) of the MPRD Regulations.
²³³ Section 69(2) read with section 43(1) of the MPRD Act; section 24R(1) of NEMA.

responsibilities of the holder as may be identified in the environmental management report to a person with the necessary qualifications.²³⁴

The MPRD Regulations contain closure objectives.²³⁵ These objectives form part of the draft environmental management program or environmental management plan.²³⁶ They must identify the key objectives from production closure to guide the project design, development and management of environmental impacts.²³⁷ They must also provide broad future land use objectives for the production site and provide proposed closure costs.²³⁸

Upon the lapsing, abandonment or cancellation of an exploration or production right, the holder thereof must apply for a closure certificate.²³⁹ The same applies when exploration or production operations are ceased,²⁴⁰ any portion of the exploration area is relinquished²⁴¹ or the prescribed closing plan to which the exploration or production right relates is completed.²⁴²

Application for a closure certificate must be made to the designated agency.²⁴³ Application must be lodged within 180 days the obligation to apply for a clearance certificate arises and must be accompanied by an environmental risk report.²⁴⁴ The MPRD Regulations prescribe the form and content of an application for a closure certificate.²⁴⁵ The application must be accompanied by an environmental risk report,²⁴⁶

²³⁴ Section 69(2) read with section 43(2) of the MPRD Act. Application for transfer of environmental liabilities must be on Form O contained in Annexure II to the MPRD Regulations. See regulation 58(1) of the MPRD Regulations. The necessary qualifications are prescribed by in regulation 59 of the MPRD Regulations.

²³⁵ Regulation 47 read with regulation 61 of the MPRD Regulations.

²³⁶ Regulation 47 read with regulation 61 of the MPRD Regulations.

²³⁷ Regulation 47 read with regulation 61(a) of the MPRD Regulations.

²³⁸ Regulation 47 read with regulation 61(b) and (c) of the MPRD Regulations.

²³⁹ Section 69(2) read with section 43(3)(a) of the MPRD Act.

²⁴⁰ Section 69(2) read with section 43(3)(b) of the MPRD Act.

²⁴¹ Section 69(2) read with section 43(3)(c) of the MPRD Act.

²⁴² Section 69(2) read with section 43(3)(d) of the MPRD Act.

²⁴³ Section 69(2) read with section 43(4) of the MPRD Act.

²⁴⁴ Section 69(2) read with section 43(4) of the MPRD Act. This section is amended by section 34(d) of the MPRD Amendment Act 49 of 2008 to delete the reference to an environmental risk report and to replace it with “required information, programmes, plans and reports prescribed in terms of this Act and the National Environmental Management Act, 1998.” The amendment will take effect on 07 December 2014.

²⁴⁵ Regulation 47 read with regulation 57 of the MPRD Regulations.

²⁴⁶ The content of this report is prescribed by regulation 60 of the MPRD Regulations.

a final performance assessment report and a completed application form for the transfer of environmental liabilities and responsibilities, if this is applied for.²⁴⁷

A closure certificate may only be issued if a number of conditions are met. First, the Chief Inspector of Mines and each government department responsible for administering any law relating to the environment have confirmed in writing that the provisions relating to health and safety and management of pollution of water resources, the pumping and treatment of extraneous water and compliance with the conditions of the environmental authorisation have been addressed.²⁴⁸ This confirmation must be received within sixty days from the date on which the Minister informs the Chief Inspector or government departments to do so.²⁴⁹ Second, the Council of Geoscience must confirm in writing that complete and correct exploration reports have been submitted to the Council.²⁵⁰ Third, complete and correct records, borehole core data or core-log data that the Council of Geoscience may deem relevant have been lodged with the Council.²⁵¹ Finally, complete and correct surface and relevant underground geological plans have been lodged with the Council for Geoscience.²⁵²

When the Minister issues a closure certificate, she must return such portion of the financial provision contemplated in the NEMA,²⁵³ as she may deem appropriate, to the holder of the exploration or production right, but may retain any portion of such financial provision for latent and residual safety, health or environmental impact which may become known in the future.²⁵⁴ The Minister may also, in consultation with the Minister of Environmental Affairs and Tourism, publish by notice in the Government Gazette strategies to facilitate production closure where production is interconnected, have an integrated impact or pose a cumulative impact²⁵⁵ or where the safety, health,

²⁴⁷ Regulation 47 read with regulation 57(2) of the MPRD Regulations.

²⁴⁸ Section 69(2) read with section 43(5) of the MPRD Act.

²⁴⁹ Section 69(2) read with section 43(5A) of the MPRD Act.

²⁵⁰ Section 69(2) read with section 43(13)(a) of the MPRD Act.

²⁵¹ Section 69(2) read with section 43(13)(b) of the MPRD Act.

²⁵² Section 69(2) read with section 43(13)(c) of the MPRD Act.

²⁵³ Section 24R(2) of the NEMA.

²⁵⁴ Section 69(2) read with section 43(6) of the MPRD Act.

²⁵⁵ Section 69(2) read with section 43(10) of the MPRD Act.

social or environmental impacts are integrated which results in a cumulative impact.²⁵⁶ NEMA, on the other hand, states that the Minister of Environment and Tourism may, by notice in the Gazette, publish strategies to facilitate mine closure where mines are interconnected, have an integrated impact or pose a cumulative impact.²⁵⁷ The Minister may also, in consultation with the Minister of Mineral Resources, and by notice in the Gazette, identify areas where mines are interconnected or their impacts are integrated to such an extent that the interconnection results in a cumulative impact.²⁵⁸ If a notice is published under the MPRD Act, the holder must amend his programmes, plans or environmental authorisations accordingly or submit a closure plan, subject to the approval of the Minister, which is aligned with the closure strategies in the notice.²⁵⁹ This is another example of where the MPRD Regulations and the NEMA overlap.

A holder of an exploration or production right must plan for, manage and implement such procedures and such requirements on production closure as may be prescribed in NEMA.²⁶⁰ NEMA in turn requires every holder to plan, manage and implement such procedures and requirements in respect of the closure of a mine as may be prescribed.²⁶¹

Finally, the MPRD Regulations deal extensively with the management of residue stockpiles and deposits.²⁶² The assessment of impacts relating to the management of residue stockpiles and deposits, where appropriate, must form part of the environmental impact assessment report and environmental management programme.²⁶³ A system of routine maintenance and repair in respect of the residue deposit must be implemented to ensure the ongoing control of pollution, the integrity of rehabilitation, health and safety matters at the site.²⁶⁴ The decommissioning, closure and post closure management of residue deposits must be addressed in the closure plan, which must contain inter alia the closure objectives, final land use or capability, conceptual description and details for closure and post-closure management, cost estimates and financial provision for closure

²⁵⁶ Section 69(2) read with section 43(9) of the MPRD Act.

²⁵⁷ Section 24R(5) of NEMA.

²⁵⁸ Section 24R(4) of NEMA.

²⁵⁹ Section 69(2) read with section 43(11) of the MPRD Act.

²⁶⁰ Section 69(2) read with section 43(7) and (8) of the MPRD Act.

²⁶¹ Section 24R(3) of the NEMA.

²⁶² Regulation 73 of the MPRD Regulations.

²⁶³ Regulation 73(1) of the MPRD Regulations.

²⁶⁴ Regulation 73(6)(b) of the MPRD Regulations.

and post-closure management and residual impacts, monitoring and requirements to obtain mine closure under the MPRD Act.²⁶⁵

Unlike the South African legislation, the Namibian legislation deals with rehabilitation as part of decommissioning and closure. As a result, it is discussed under the same heading and no distinction is made between rehabilitation on the one hand and decommissioning and closure on the other hand.

Decommissioning, rehabilitation and closure are dealt with primarily under the Petroleum Act and the petroleum agreement. Some provisions of the EMA are also applicable.

An application for a production licence must, apart from what has been stated above and in Chapter Five, contain a proposed programme of production operations and of the processing of petroleum in question. This program must include separate decommissioning plans²⁶⁶ in respect of the production area and any area outside such production area where activities in connection with the production operations in such production area are being carried out. More specifically, it must set out to the satisfaction of the Minister (acting in consultation with the Minister of Environment and Tourism, the Minister of Fisheries and Marine Resources and the Minister of Finance), the measures proposed to be taken after cessation of such production operations to remove or otherwise deal with all installations, equipment, pipelines and other facilities, whether on-shore or off-shore, erected or used for purposes of such operations and to rehabilitate land disturbed by way of such operations.²⁶⁷

The holder of a production licence must review, and if necessary, revise the decommissioning plan. This must be done one year before the estimated date on which 50% of the estimated recoverable reserves of petroleum in the production area would

²⁶⁵ Regulation 73(8) of the MPRD Regulations.

²⁶⁶ The MPA defines “decommissioning plan” as “the package of measures proposed by the Company pursuant to s.46(2)(viA) of the Petroleum Act to be taken after cessation of production operations to remove or otherwise deal with all installations, equipment, pipelines and other facilities, whether on shore or off shore, erected or used for purposes of such operations and to rehabilitate land disturbed by way of such operations, reviewed pursuant to s.68A(1) and either approved or revised by the Minister pursuant to s.68A(2) or 68A(3) of the Petroleum Act”. See clause 1.1(n) of the Model Petroleum Agreement.

²⁶⁷ Section 42(2)(i)(vi) of the Petroleum Act.

have been produced. The Minister may, acting in consultation with the Minister of Environment and Tourism, the Minister of Fisheries and Marine Resources and the Minister of Finance, approve the reviewed or revised decommissioning plan or refer it back to the holder of the production licence concerned to make such amendments as the Minister may deem necessary.²⁶⁸

Other than the general provisions in the Petroleum Act, it is also a term and condition of an exploration licence that the holder thereof remove from the exploration area, or otherwise deal with, as directed by the Minister in consultation with the Minister or Ministers responsible for environment, fisheries and finance, all installations, equipment, pipelines and other facilities, whether on-shore or off-shore, not used or intended to be used in connection with such exploration operations.²⁶⁹ The same condition is not listed for the holder of a production licence.

The MPA states that, on expiration or termination of the MPA or on relinquishment of part of the licence area, the holder must remove or otherwise deal with, as directed by the Minister in consultation with the Minister or Ministers responsible for environment, fisheries and finance, all equipment and installations from the licence area or relinquished area to the extent and in the manner agreed with the Minister in terms of the decommissioning plan approved by the Minister.²⁷⁰ The same applies to all installations, equipment, pipelines and other facilities erected or used outside the licence area for the petroleum operations.²⁷¹ The holder must also perform all necessary site restoration activities in accordance with good oilfield practices and take all other action necessary to prevent hazards to human life or to the property of others or the environment.²⁷²

The MPA obliges the holder to establish a trust fund for the purpose of decommissioning facilities on cessation of production operations.²⁷³ This is dealt with in more detail in the Petroleum Act and is in line with the general international

²⁶⁸ Section 68A(2) of the Petroleum Act.
²⁶⁹ Section 38(1)(d) of the Petroleum Act.
²⁷⁰ Clause 11.16(a) of the Petroleum Act.
²⁷¹ Clause 11.16(b) of the Petroleum Act.
²⁷² Clause 11.16(c) of the Petroleum Act.
²⁷³ Clause 11.17 of the Petroleum Act.

environmental management tools discussed above. The trust deed must be approved by the Minister of Mines and Energy after consultation with the Minister of Finance.²⁷⁴ The holder must annually contribute to the trust fund and the value must represent the estimated future costs of decommissioning the facilities in the production area on cessation of production operations in such area and the costs of the administration of the trust fund.²⁷⁵ If facilities outside the licence area are being used in connection with production, then a separate trust fund must be established for these facilities.²⁷⁶ The trust fund must be managed by a board of trustees consisting of such equal number of persons, not fewer than four members, as may be determined by mutual agreement between the Minister of Mines and Energy and the holder of the licence concerned. One-half of the trustees must be nominated by the Minister and the other half must be nominated by the holder of the licence concerned.²⁷⁷ The Minister must designate the chairperson and vice-chairperson.²⁷⁸ The Petroleum Act prescribes some of the functions of the trustees.²⁷⁹

When applying for an ECC, a proponent has to prepare a scoping report, which is discussed above.²⁸⁰ The scoping report include a draft EMP, which in turn must include information on any proposed management, mitigation, protection or remedial measures to be undertaken to address the effects on the environment that have been identified, including objectives in respect of the rehabilitation of the environment and closure.²⁸¹ This draft management plan must also include, as far as is reasonably practicable, measures to rehabilitate the environment affected by the exploration or prospecting to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.²⁸² Finally, it must include a description of the manner in which the applicant intends to modify, remedy, control or stop any

²⁷⁴ Section 68B(3) of the Petroleum Act.

²⁷⁵ Section 68B(1)(a) of the Petroleum Act.

²⁷⁶ Section 68B(2) of the Petroleum Act.

²⁷⁷ Section 68B(4)(a) of the Petroleum Act.

²⁷⁸ Section 68B(4)(b) of the Petroleum Act.

²⁷⁹ Section 68B(5) of the Petroleum Act.

²⁸⁰ See 2.4.2.2.1 above.

²⁸¹ Regulation 8(j)(aa) of the EMA Regulations.

²⁸² Regulation 8(j)(bb) of the EMA Regulations.

action, activity or process which causes pollution or environmental degradation remedy the cause of pollution or degradation and migration of pollutants.²⁸³

Decommissioning and abandonment are recent issues in the international sphere and the regulation thereof is a major concern worldwide.²⁸⁴ Laws and regulations dealing with decommissioning remain largely untested, despite the immensity of these provisions.²⁸⁵ Even in an established system like the UK, abandonment is provided for briefly and in a discretionary manner.²⁸⁶ In Namibia and South Africa, very little has been written on decommissioning, probably because in practice the industry has not yet reached that stage. From a practical point of view, therefore, it is uncertain how the legislation will be applied.

Both South Africa and Namibia deal with the obligations of holders of rights to petroleum in respect of rehabilitation and decommissioning and production closure. Both countries also provide for financial provision to be made in respect of rehabilitation and decommissioning and closure. This is important to ensure that the interests of persons affected by petroleum operations are protected. People need to have certainty that the petroleum company will be in a position to rehabilitate and close production. By including obligations for financial provision, this comfort is given.

South Africa distinguishes between rehabilitation, which takes place during petroleum operations, and decommissioning and closure, which takes place when petroleum operations are wrapped up. In Namibia, this distinction is not made. The effect, however, is the same and holders in both jurisdictions are obliged to rehabilitate the environment and have additional duties in respect of decommissioning and closure.

²⁸³ Regulation 8(j)(cc) of the EMA Regulations.

²⁸⁴ Dias A "The Oil and Gas Industry in the Tangled Web of Environmental Regulation: Spider or Fly?" in Gao Z (ed) *Environmental Regulation of Oil and Gas* (1998) London Kluwer Law International at 83; Gao Z "International Law on Offshore Abandonment: Recent Developments, Current Issues and Future Directions" in Gao Z (ed) *Environmental Regulation of Oil and Gas* (1998) London Kluwer Law International at 143.

²⁸⁵ Cameron P "Tackling the Decommissioning Problem" (1999) *Natural Resources & Environment* 121 at 121.

²⁸⁶ Section 29(1) of the Petroleum Act 1998 states that the Secretary of State *may* by written notice require the recipient of the notice to submit to the Secretary a programme setting out the measures proposed to be taken in connection with the abandonment of an offshore installation or submarine pipeline. See also Alramahi (note 53) at §3.276.

Holders of petroleum licences in Namibia must comply with good oilfield practices in respect of rehabilitation, decommissioning and production closure. While this gives an international dimension to the content of access to petroleum in Namibia, these provisions are negotiable in the petroleum agreement and the public does not have insight into the final, signed agreement. In this respect, the Namibian legislative framework lacks transparency. These provisions are also vague and it is uncertain what exactly is expected from holders.²⁸⁷

2.5 Consequences of Non-compliance with Statutory Measures

The efficiency of the statutory regulation of the environment in the context of petroleum exploitation (and in general) depends on the effectiveness of the consequences of non-compliance. Enforcement has, however, been traditionally viewed as weak and ineffective in many developing countries, partly because of a lack of resources and political will.²⁸⁸ Lack of resources, however, are encouraging many countries to “step up environmental enforcement as a way of generating revenues to pay for government activities and services”.²⁸⁹

Both the South African and Namibian legislation make it a criminal offence if a person conducts a listed activity without the proper EAs (in South Africa) or ECCs (in Namibia).²⁹⁰ Any person found guilty may be subject to imprisonment or a fine or both. The maximum period of imprisonment in South Africa is ten years and in Namibia twenty-five years and the maximum fine in South Africa is R5 million and in Namibia N\$500,000.00.²⁹¹

Aside from the above, both the NEMA and the EMA contains numerous other incidents where non-compliance with these acts is a criminal offence. The consequences are far-reaching as non-compliance may lead to imprisonment or a fine or both. Imprisonment terms range between one and ten years in South Africa and two to twenty-five years in Namibia, while the fines in South Africa range from one to five million South African

²⁸⁷ See above at 3.3.2.2.

²⁸⁸ Armstrong (note 41) at 374.

²⁸⁹ Armstrong (note 41) at 374 – 375.

²⁹⁰ Section 24F of the NEMA and section 27(4) of the EMA.

²⁹¹ Section 24F(4) of the NEMA and section 27(4) of the EMA.

Rand and in Namibia from N\$10,000.00 to N\$100,000.00.²⁹² Both Acts also pierce the corporate veil by providing for potential liability of directors of companies found guilty in terms of these Acts²⁹³ and provide for forfeiture in favour of the state of items and assets used in connection with the offence.²⁹⁴

In terms of the EMA, the Environmental Commissioner in Namibia may appoint environmental officers for the purposes of carrying out the provisions of the EMA.²⁹⁵ These environmental officers have wide powers in terms of the EMA in respect of entry into premises, inspection of books, records and other documents and seizure of any relevant material.²⁹⁶ Environmental officers may also issue compliance orders in the event of a contravention of the EMA or the conditions of a clearance certificate.²⁹⁷ Failure to comply with a compliance order is a criminal offence.²⁹⁸

The NEMA in South Africa does not provide for environmental officers. Instead, it provides for the designation of environmental management inspectors.²⁹⁹ The functions of environmental management inspectors include monitoring and enforcing compliance with an environmental law for which he has been designated and investigating possible offences or contraventions of that law or a permit or authorisation issued in terms of that law.³⁰⁰ As with the environmental officers in Namibia, environmental management inspectors have wide powers in respect of entry, search and seizure.³⁰¹ However, the NEMA also provides for powers of environmental management officers to stop, enter and search vehicles and vessels and to carry out routine inspections.³⁰² Environmental management officers may also issue compliance notices and failure to comply with a compliance notice is a criminal offence.³⁰³

²⁹² See for example section 24F(4) of the NEMA and section 20(8), section 22(2) and section 27(3) of the EMA.

²⁹³ Section 34(7) of the NEMA and section 53(1) of the EMA.

²⁹⁴ Section 34D of the NEMA and section 54 of the EMA.

²⁹⁵ Section 18(1) of the EMA.

²⁹⁶ Section 19 of the EMA.

²⁹⁷ Section 20(2) of the EMA.

²⁹⁸ Section 20(8) of the EMA.

²⁹⁹ Section 31B of the NEMA.

³⁰⁰ Section 31G(1) of the NEMA.

³⁰¹ Section 31H and 31I of the NEMA.

³⁰² Section 31J and 31K of the NEMA.

³⁰³ Section 31L and 31N of the NEMA.

By criminalising non-compliance with environmental obligations, both the Namibian and South African legislative frameworks for petroleum ensures accountability of petroleum companies as regards their duties in respect of the environment. Furthermore, by expressly stating the consequences of non-compliance, transparency is promoted. The rights of the host nations in respect of the environment are also enforced. However, criminalisation and criminal prosecution of environmental offences has a downside as well, as it requires significant costs for the state.³⁰⁴ There may also be significant time delays between the commissioning of the offence and the prosecution thereof.³⁰⁵ Furthermore, criminal prosecution of environmental offences is reactive in nature and is designed to react to offences already committed. It is not aimed at remedying environmental damage already caused.³⁰⁶ This is contrary to the primary objective of environmental law, namely conserving the environment. Incorporating criminal prosecution into environmental law, however, does act as a deterrent for persons from committing environmental offences.³⁰⁷

A better alternative to criminal sanctions may be administrative measures, such as compliance notices.³⁰⁸ This is less costly and time consuming and more in line with the objective of environmental law. Both NEMA and EMA provide for the possibility of issuing compliance notices.

2.6 Enforcement in terms of Common Law

The enforcement of a right to a clean environment in terms of the Constitution and environmental legislation is discussed above and in Chapter Four. However, persons whose rights in respect of the environment have been affected also have certain remedies available to them in terms of common law. Because Namibia and South Africa share a common law, the enforcement of environmental rights in terms of the common law is similar in both jurisdictions. The fact that the common-law remedies in respect of damage to the environment is still in force provides additional transparency and accountability in the legislative framework for petroleum. The reason for this is

³⁰⁴ Burns and Kidd (note 64) at 244.

³⁰⁵ Burns and Kidd (note 64) at 244.

³⁰⁶ Burns and Kidd (note 64) at 245.

³⁰⁷ Burns and Kidd (note 64) at 245.

³⁰⁸ Burns and Kidd (note 64) at 257.

that common-law remedies, the elements of which are well-established and therefore transparent,³⁰⁹ are additional methods for a person whose right to a clean environment is affected. While these remedies are typically used against the polluter, it may also be employed against the state if all the elements are met.

Under the common law, where a person commits an unlawful act, he may be held delictually liable.³¹⁰ Five elements must be proved before a person can be held delictually liable. These are conduct, wrongfulness, fault (either negligence or intent), harm and causation.³¹¹ Delicts can also be committed in respect of the environment.³¹² The harm suffered in an environmental context may take one of two forms. First, it may be harm to the person or privately-owned property. Secondly, it may be harm to the environment where no private law interests or rights are affected.³¹³ The second form will only give rise to delictual liability where contemporaneous harm is caused to individual interests.³¹⁴ In the event of actual harm, the affected person may claim for damages. Where harm is threatened, the person whose rights may be affected may apply for an interdict.³¹⁵

Environmental harm in the context of neighbouring owners of land fall under a very specific area of common law, namely nuisance.³¹⁶ Nuisance refers to conduct causing actual or potential damage, discomfort or injury to neighbours.³¹⁷ An action based on nuisance normally involves neighbouring land owners, but does not necessarily have to

³⁰⁹ See Visser D "Delict" in Du Bois F (ed) *Wille's Principles of South African Law* 9ed (2007) Wetton Juta & Co at 1096 for the elements of delictual liability.

³¹⁰ See Visser (note 286) at 1091.

³¹¹ Visser (note 286) at 1096.

³¹² Summers R "Common-law Remedies for Environmental Protection" in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa* (2010) Claremont, Juta Law at 341-342.

³¹³ Summers (note 289) at 342.

³¹⁴ Summers (note 289) at 342.

³¹⁵ Summers (note 289) at 342.

³¹⁶ Summers (note 289) at 342.

³¹⁷ Van der Merwe D "Neighbour Law" in Zimmerman R and Visser D (eds) *Southern Cross - Civil Law and Common Law in South Africa* (1996) Kenwyn Juta & Co Ltd at 759; Mostert H "Nuisance" in Reid E and Visser D (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) Edinburgh Edinburgh University Press at 256.

be limited to neighbours – the essence of nuisance lies the interference of proprietary interests rather than the geographical relationship of land units.³¹⁸

The principles of nuisance have been invoked in South Africa in numerous instances in the context of environmental harm.³¹⁹ An action in nuisance is, however, not primarily aimed at protecting the environment. Rather, its purpose “is to control that conduct [causing the nuisance] to protect proprietary rights rather than to protect the environment per se.”³²⁰ An interdict may also be applied for to prevent the occurrence or continuance of a nuisance.³²¹

3. Emergency Incidents

As mentioned in the introduction, the potential effects that petroleum exploitation may have on the environment are substantial. Catastrophic incidents such as well-blowouts or large oil spills need to be addressed effectively and timeously to minimise the harm on the environment. It is important for a regulatory framework for petroleum to address emergency incidents as well.

In Namibia, neither the petroleum nor the environmental legislation deals with the control over emergency incidents by the state. This is a major flaw in the regulatory framework for petroleum resources as it leaves the organisation of, planning for and control over emergency incidents to the petroleum companies without proper state involvement. So, for example, the Petroleum Act states that in the event that petroleum or any other substance is spilled in the sea or on land or any water source, the holder must report the spillage as soon as possible and take at its own costs all such steps as may be necessary in accordance with good oilfield practices or otherwise as may be necessary to remedy such spilling, pollution, loss or damage.³²² If the holder fails to do so after being notice by the Minister, the Minister may cause such steps to be taken as may be necessary to remedy such spilling, pollution or damage or loss and recover in a

³¹⁸ Church J and Church J "Nuisance" in WA Joubert (ed) *The Law of South Africa* Vol 19(1), (2003) Durban, LexisNexis Butterworths at par 169; Summers (note 289) at 343.

³¹⁹ See Summers (note 289) at 344 and the case law cited there.

³²⁰ Summers (note 289) at 345.

³²¹ Summers (note 289) at 345.

³²² Section 71(1) of the Petroleum Act.

competent court the costs incurred thereby from such holder.³²³ Similar provisions are contained in the MPA.³²⁴

In South Africa, the legislature provided for control of emergency incidents in the NEMA.³²⁵ In terms of the NEMA, if an incident³²⁶ occurs, the responsible person or his employer must immediately report the nature of the incident, the risks posed to public health, safety and property and the toxicity of substances or by-products released by the incident.³²⁷ The responsible person must also report any steps that should be taken to avoid or minimise the effects of the incident on public health and the environment.³²⁸ Reporting is done to the Director-General, the South African Police Services and the relevant fire service, the relevant provincial head of department or municipality and all persons whose health may be affected by the incident.³²⁹ The responsible person or his employer must then take all reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons.³³⁰ He must also undertake clean-up procedures, remedy the effects of the incident and assess the immediate and long-term effects of the incident on the environment and public health.³³¹

Within 14 days of the incident, the responsible person must report to the Director-General, provincial head of department and municipality such information as is available to enable an initial evaluation of the incident.³³² The information may include the nature of the incident, the substances involved and an estimation of the quantity released and their possible acute effect on persons and the environment and data needed to assess these effects, initial measures taken to minimise impacts, causes of the incident, whether direct or indirect, including equipment, technology, system, or

³²³ Section 71(2) of the Petroleum Act.

³²⁴ See clause 11.12 and 11.13 of the MPA.

³²⁵ Section 30 of the NEMA.

³²⁶ An “incident” is defined as “an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed”. See section 30(1)(a) of the NEMA.

³²⁷ Section 30(3)(a) to (c) of the NEMA.

³²⁸ Section 30(3)(d) of the NEMA.

³²⁹ Section 30(3) of the NEMA.

³³⁰ Section 30(4)(a) of the NEMA.

³³¹ Section 30(4)(b) to (d) of the NEMA.

³³² Section 30(5) of the NEMA.

management failure and measures taken and to be taken to avoid a recurrence of such incident.³³³

A relevant authority may direct the responsible person to undertake specific measures within a specific time to fulfil his obligations in terms of NEMA in respect of emergency incidents.³³⁴ If he fails to do so, or there is uncertainty who the responsible person is, or there be an immediate risk of serious danger to the public or potentially serious detriment to the environment a relevant authority may take the measures it considers necessary to contain and minimise the effects of the incident, undertake clean-up procedures and remedy the effects of the incident.³³⁵ The relevant authority may claim reimbursement from the relevant person for any costs incurred by the relevant authority.³³⁶

Whenever a relevant authority directs the relevant person to take certain steps, or where the relevant authority itself takes certain steps in respect of controlling an emergency incident, it must as soon as reasonably practicable, prepare comprehensive reports on the incident.³³⁷ These reports must be made available to the Director-General, the public, the South African Police Services and the relevant fire prevention service, the relevant provincial head of department or municipality and all persons who may be affected by the incident.³³⁸

Any relevant person who contravenes or fails to comply with the provisions of NEMA relating to emergency incidents is guilty of an offence. On conviction, he may be liable to a fine of R1 million or to imprisonment for a maximum period of one year or both such fine and imprisonment.³³⁹

³³³ Section 30(5) of the NEMA.
³³⁴ Section 30(6) of the NEMA.
³³⁵ Section 30(8) of the NEMA.
³³⁶ Section 30(9) of the NEMA.
³³⁷ Section 30(10) of the NEMA.
³³⁸ Section 30(10) of the NEMA.
³³⁹ Section 30(11) of the NEMA.

4. Conclusion

The South African and Namibian legislation generally adopt a broad approach in its legislation with regard to environmental assessment. This broader approach would normally require the assessment of projects and policies,³⁴⁰ but the regulations dealing with environmental assessment in respect of petroleum only focus on specific projects.³⁴¹ The primary legislation dealing with petroleum exploitation and environmental protection is furthermore silent on various other important issues, such as liability for historic damage to the environment.³⁴² Furthermore, there is not requirement for environmental insurance policies, which is an acceptable international environmental management tool.³⁴³

South Africa and Namibia follow general international trends by making provision for petroleum exploitation and environmental protection in a number of statutes and, in Namibia, in petroleum agreements. Few countries have introduced a consolidated, integrated legislative framework for petroleum exploitation and environmental protection – Peru and Ecuador being two examples.³⁴⁴ Such legislation is desirable as “a comprehensive petroleum environmental regulation is politically desirable, legally feasible, and practically implementable.”³⁴⁵ It should be encouraged, especially in developing petroleum producing countries.³⁴⁶ A comprehensive, integrated petroleum environmental framework would not only promote transparency and accountability, but would also ensure that proper effect is given to the right to a clean environment. Furthermore, it would also operate to the benefit of the investor or petroleum company. A lack of a comprehensive petroleum environmental framework may cause unnecessary delays or even suspension or cancellation of petroleum operations.³⁴⁷

In Namibia, the environment is dealt with as a principle of state policy, as opposed to its South African counterpart, where a right to a clean environment is a guaranteed

³⁴⁰ Glazewski and Du Toit (note 35) at 10-3.

³⁴¹ See for example Glazewski and Du Toit (note 35) at 10-3.

³⁴² Badenhorst PJ, Mostert H and Dendy M “Minerals and Petroleum” in Joubert WA (ed) *The Law of South Africa Vol 18* 2ed (2007) Durban LexisNexis at par 204.

³⁴³ See 2.2 above.

³⁴⁴ Gao (note 2) at 39.

³⁴⁵ Gao (note 2) at 39.

³⁴⁶ Gao (note 2) at 39.

³⁴⁷ See for example Gao (note 2) at 45.

right. In Namibia, the EMA also does not provide for standing for persons who wish to enforce their rights in respect of the environment. This, together with the fact that Namibia does not have an enforceable constitutional right to a clean environment, makes it very difficult for the public to take action against holders of petroleum licences to comply with their obligations in terms of the EMA. This is important for accountability and transparency purposes as it gives the public access to relief where their environmental right is infringed. Although it is possible in Namibia and South Africa to enforce certain environmental rights in terms of common law, the scope is much narrower. A person can only rely on common law to enforce environmental rights if that person is directly affected by it.

The NEMA places obligations on holders of exploration and production rights to uphold the principles of NEMA and other environmental legislation. The NEMA requires environmental authorisation before commencing with exploration or production activities. Contravention of the NEMA and conditions of an environmental authorisation is a criminal offence and may lead to a fine, imprisonment or both. Environmental management inspectors are appointed to ensure compliance with the NEMA and other environmental legislation. So, from the perspective of the holder of an exploration or production right, regulatory measures in respect of the environment are in place.

The EMA, as with NEMA in South Africa, places various obligations on the holders of exploration and production licences. The Minister may not issue an exploration or production licence before the applicant has been awarded an ECC by the Environmental Commissioner. Contravention of the EMA and conditions of an ECC is a criminal offence and may lead to a fine, imprisonment or both. Environmental officers are appointed to ensure compliance with the EMA. Unlike South African environmental management inspectors, the powers of the environmental officers are limited to ensuring that the provisions of the EMA are complied with and does not extend to other environmental legislation.

The duties of holders of rights to petroleum in respect of the environment provide further content to access to petroleum resources. Not only does it ensure that the rights of host nations to a clean environment is promoted, but by statutorily entrenching the

duties transparency and accountability in the legislative frameworks for petroleum are promoted. In Namibia, the content of access to petroleum is amplified by the petroleum agreement, but the final, signed contract is not available to the public and hence lacks transparency.

Environmental law, however, is not only contained in the Constitutions, legislation and judicial decisions relating to the environment. It also incorporates the general principles and specific principles of administrative law, which applies to all environmental issues, unless specifically excluded by statute.³⁴⁸ Furthermore, environmental law falls within public law, which means the legal relationships within environmental law are characterised by inequality, as one party is always the state or public official.³⁴⁹ As result, the principles of environmental law discussed in this chapter does not exist in isolation. It must be read against the backdrop of the principles of administrative law, discussed in Chapter Nine.

³⁴⁸ Burns and Kidd (note 64) at 222. The authors explain that environmental law primarily belong to the field of specific administrative law, which is that area of administrative law that applies specifically to an area, such as the environment. However, general prinviples of administrative law (such as the general righth to administrative justice) aslo applies to environmental law.

³⁴⁹ Burns and Kidd (note 64) at 222 – 223.

Chapter Seven:

BENEFIT CREATION: ROYALTY AND TAXATION

1. Introduction

As stated in Chapter One, Namibia and South Africa are not major players in the international petroleum industry. As such, they need to attract investors to develop their petroleum industries. This is done partially through the legislative regime relating to royalties and taxation in these two countries.¹ The legal framework embodying the fiscal regime applicable to petroleum companies will make a country more or less attractive for investment.² It will also allow a state to capture resource rent, thus creating a benefit for the state.³

Namibia and South Africa both grant exclusive rights to petroleum companies to exploit petroleum.⁴ Because these two countries therefore have no claim in respect of the produced petroleum (as in the case of countries using production sharing contracts or service contracts),⁵ measures must be put in place to ensure that a benefit is generated for the state. In countries following a system where an exclusive right is granted to the petroleum country, this benefit is usually generated by imposing royalty and taxation on petroleum exploitation. States may use these costs imposed on

¹ See for example Moolman AM *Evaluating Incentives in the Tax Legislation Applicable to the South African Oil, Petroleum and Gas Industries* (unpublished MComm-thesis, North-West University, 2012) at 41.

² African Development Bank and the African Union *Oil and Gas in Africa* (2009) New York Oxford University Press Inc at 80: “The competitiveness of the regime is an essential determinant of the amount of upstream investment in exploration, discovery, and production by multinational oil companies.” See also Mintz J and Chen D “Capturing Economic Rents from Resources Through Royalties and Taxes” (October 2012) *The School of Public Policy: SPP Research Papers* 1 at i.

³ Hunter T *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis* (unpublished PhD-thesis, University of Bergen, 2010) at 73.

⁴ See Chapter Six above.

⁵ See Chapter Three above.

petroleum companies for economic growth and indirectly benefiting the host communities.⁶

The central objective in designing a petroleum fiscal regime is succinctly stated by Nakhle:⁷ “to acquire for the state in whose legal territory the resources in question lie, a fair share of the wealth accruing from the extraction of that resource, whilst encouraging investors to ensure optimal economic recovery of the hydrocarbon resources.” The purpose of this chapter is to discuss petroleum royalty and taxation in respect of petroleum in South Africa and Namibia. It seeks to determine what measures are put in place in these two countries to ensure that the host countries benefit from the exploitation of petroleum resources, while at the same time encouraging investment.

Since this thesis is focused on the legal framework for petroleum resources, the discussion of petroleum royalty and taxation is limited to the legislative framework for petroleum royalty and taxation and not the economic or accounting aspects thereof. Furthermore, the focus is specifically on royalty and taxation directly applicable to petroleum companies and not the general fiscal regime of South Africa and Namibia. In doing so, it focuses on two aspects of the petroleum fiscal regimes of South Africa: (i) the creation of a benefit for the host country in sharing in the petroleum wealth by imposing an obligation on the petroleum company to pay royalty and taxes; and (ii) measures put in place to benefit investors.

Petroleum royalty and taxation does not only operate to benefit the host country and to attract investors. It also contributes to government accountability.⁸ It may be argued that a “lack of a viable tax regime can impede broad economic growth and the development of democracy”.⁹ The state after all acts as agent of the nation and must ensure that the country properly benefits from the petroleum resources within its borders. However, another pattern may arise: government may draw so much from petroleum revenues that it is no longer necessary for its citizens to be taxed. This may

⁶ Moolman (note 1) at 15.

⁷ Nakhle C “Petroleum Fiscal Regimes: Evolution and Challenges” in Daniel P, Keen M and McPherson C (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) London Routledge at 89.

⁸ Nakhle C *Petroleum Taxation* (2008) New York Routledge at 10; Ross ML *The Oil Curse* (2012) New Jersey Princeton University Press at 5 – 6.

⁹ Nakhle (note 8) at 10.

in turn lead to no representation and this is unsustainable in the long run.¹⁰ This illustrates the importance of a proper fiscal regime.

2. Why Should Petroleum Resources be Treated Differently?

The exploitation of petroleum resources is different from other income-generating activities that companies may undertake and often different taxation rules apply to companies exploiting non-renewable resources.¹¹ For one, it may take many years between exploration and production and ultimately rehabilitation.¹² Fiscal stability is therefore very important for investors, who must be confident that the fiscal regime under which it will operate will not be subject to radical changes at the whim of the host government.¹³ Furthermore, the initial stages of petroleum exploitation (notably the exploration phase) is cost-intensive and not aimed at generating an income.¹⁴ Uncertainty also plays a major role: when a company undertakes exploration operations, it is uncertain whether an economically viable discovery will be made.¹⁵ By the same token, petroleum operations hold prospects of substantial economic rents.¹⁶

Aside from the above, the exploitation of petroleum resources requires financial and technical capabilities that are not necessarily available in South Africa or Namibia. To exploit these resources, it is necessary to rely on foreign petroleum companies to do the exploitation. This, however, creates a problem for host countries. On the one hand, the host country's framework with regard to the exploitation of natural resources needs to be attractive enough for investors to want to invest in the country. On the other hand, the host country must ensure that the nation somehow benefits from the exploitation of

¹⁰ Nakhle (note 8) at 10.

¹¹ Otto J, Andrews C, Cawood F, Doggett M, Guj P, Stermole F and Tilton J *Mining Royalty: A Global Study of Their Impact on Investors, Government, and Civil Society* (2006) Washington The International Bank for Reconstruction and Development / The World Bank at 11.

¹² Hamilton K and Ley E "Sustainable Fiscal Policy for Mineral-based Economies" in Arezki R, Gylfason T and Sy A (eds) *Beyond the Curse: Policies to Harness the Power of Natural Resources* (2011) Washington DC International Monetary Fund at 131.

¹³ See for example Boadway R and Keen M "Theoretical Perspectives on Resource Tax Design" in Daniel P, Keen M and McPherson C (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) New York Routledge at 15; Otto et al (note 11) at 12..

¹⁴ See Chapter Two and Chapter Three above and Hamilton and Ley (note 12) at 131..

¹⁵ See Chapter Two and Chapter Three above.

¹⁶ Boadway and Keen (note 13) at 15. See Chapter One above for a discussion of economic rent.

the resources.¹⁷ The host country needs to ensure that, when designing its regulatory framework for mineral and petroleum resources, it strikes a balance between the interests of the mineral and petroleum company doing the exploitation and the nation as “owners” of the resource.¹⁸

The petroleum company, on the other hand, is placed in a “complex business arrangement” with the host country.¹⁹ This business arrangement involves the petroleum company, who has the necessary capital, technology and equipment to exploit the resources, and the host country, who controls access to the resources, in a sector characterized by high stakes, risks and potential vast profits.²⁰ Because of the potential long duration of a petroleum-related project, coupled with the volatile petroleum prices, petroleum companies are also exposed to long-term risk.²¹ Petroleum companies therefore need some sort of protection that will ensure a stable investment climate.

Resource taxation is an effective way of ensuring that the host country receives some benefit from the resources exploited within its border. In fact, it is one of the main ways to ensure that a benefit is generated for the people of the country. The other important way of ensuring local benefit is by imposing reform measures within the industry, such as socio-economic empowerment measures, discussed in the next chapter. Importantly, however, host countries must design the resource taxation system in such a way that maximum benefit is ensured for the people, without estranging investors. The more a government taxes petroleum companies, the more the government will get from its petroleum operations but the less the petroleum company will receive. This undermines the company’s incentive to invest in the country, killing

¹⁷ See for example Dale MO “Comparative International and African Mineral Law as Applied in the Formation of the New South African Mineral Development Legislation” in Bastida E, Wälde T and Warden-Fernández J (eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) The Hague Kluwer Law International at 841; Stiglitz J “Making Natural Resources into a Blessing rather than a Curse” in Tsalik S and Schiffrin A (eds) *Covering Oil: A Reporter's Guide to Energy and Development* (2005) New York Open Institute Society at 18.

¹⁸ See Chapter One and Chapter Three above.

¹⁹ Coale MTB “Stabilization Clauses in International Petroleum Transactions” (2001-2002) *Denver Journal of International Law and Policy* 217 at 218.

²⁰ Coale (note 19) at 218 – 219.

²¹ Coale (note 19) at 219.

“the goose that lays the golden egg”.²² On the other hand, the less tax is levied, the less benefit will flow to the host country.²³ Governments must therefore achieve the optimal level of taxation – a level of taxation that will benefit both the host country and the petroleum company.²⁴ At the same time, the substantial risks that petroleum companies face over long periods must in some way be mitigated by the host government’s revenue framework for petroleum resources.

The remainder of this chapter discusses how wealth from petroleum resources is generated. It first discusses the imposition of petroleum royalties, followed by a discussion of the direct taxes imposed on petroleum companies and how these taxes may differ from normal corporate taxes. The chapter then concludes with a discussion of possible ways of using petroleum revenue potential to enrich a nation.

3. Petroleum Royalty

Royalty on petroleum is collected as compensation to the owner of the petroleum resources in return for the removal of these non-renewable resources from the land.²⁵ More specifically, it is payment in lieu of permission for the mining (or petroleum) company to gain access to the resources and the right to develop these resources for the company’s own benefit.²⁶ In line with this, the intention of the Mineral and Petroleum Resources Royalty Act²⁷ (“MPRRA”) is to compensate the state as custodian of the South Africa’s mineral and petroleum resources for the exploitation of its non-renewable resources.²⁸

Whether royalty may be considered a tax or not is uncertain. Some hold the view that, since royalty is paid to the owner of a resource as compensation for the depletion of that resource, it is not a tax but rather consideration payable to the state for the

²² Otto et al (note 11) at 8.

²³ Otto et al (note 11) at 8.

²⁴ Otto et al (note 11) at 8.

²⁵ See et al (note 11) at 41; Henrico JH “Royalty on Non-Renewable Resources in South Africa: An International Comparison” (unpublished LLM-thesis, University of Pretoria, 2012) at 1.

²⁶ Otto et al (note 11) at 42.

²⁷ Mineral and Petroleum Resources Royalty Act 28 of 2008.

²⁸ Cawood F “Getting to Grips with Royalty Tax” 04 May 2010 *Inside Mining* 24 at 24.

extraction of petroleum.²⁹ Others hold the view that royalty is a mining or production tax.³⁰ In Namibia, whether royalty may be considered a tax on petroleum production or a consideration payable to the state for the extraction of its resources is not a major concern – petroleum resources vest in the ownership of the state.³¹

In South Africa, however, the issue of whether mineral and petroleum royalties are taxes or considerations payable to the resource owner is more contentious: if royalty is not a tax but rather a consideration payable to the state as owner of the resources, then the issue of custodianship and where ownership of unsevered minerals vest is applicable. If one states that royalty are consideration payable to the state as owner of the resources, then one can argue that the MPRD Act vested ownership of unsevered minerals in the state and by implication expropriated private ownership of petroleum resources. However, one can also argue that, if royalty are consideration payable to the owner of resources for the extraction of the resource, then the state as regulator must collect these resources *on behalf of the nation*, in whom the resources ultimately vest.³² This is supported by the fact that the MPRD Act specifically directs the state as custodian to collect royalty.³³ Collecting royalty is therefore one of the regulatory functions of the state as custodian, acting on behalf of the nation.

A royalty regime should be aimed at achieving an optimal trade-off between encouraging investment to extract resources on the one hand, and earning a large revenue for the owner of the resource on the other hand.³⁴ The optimal trade-off will be achieved when the fiscal risk associated with the royalty is shared equally between the state and the petroleum company: where the petroleum is depleted for no consideration, the state bears the fiscal risk; where the petroleum company is required to pay royalty irrespective of profit, it bears the fiscal risk.³⁵ An increased risk in developing

²⁹ Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at MPRRA-1.

³⁰ See for example Henrico (note 25) at 16.

³¹ See Chapter Four above.

³² See also Cawood (note 28) at 24.

³³ Section 3(4) of the MPRD Act.

³⁴ Van der Zaan P and Nel P “The Impact of the Mineral and Petroleum Resources Royalty Act on the South African Mining Industry: A Critical Analysis” 2010 *Meditari Accountancy Research* 89 at 96.

³⁵ Van der Zaan and Nel (note 34) at 96; Otto et al (note 25) at 42.

petroleum resources and low commodity prices may cause investors to be highly selective when deciding on whether to invest in the petroleum industry of a specific country.³⁶

In South Africa, royalty is levied in terms of the MPRRA and the Mineral and Petroleum Resources Royalty (Administration) Act³⁷ (“**MPRRAA**”). In Namibia, royalty is dealt with in terms of the Petroleum (Exploration and Production) Act³⁸ (“**Petroleum Act**”) and the compulsory Petroleum Agreement between the holder and the state.³⁹

3.1 The Obligation to Pay Royalty

In South Africa, petroleum resources belong to the nation and the state is custodian of petroleum resources for the benefit of the nation.⁴⁰ The authority of the state to impose royalty on petroleum resources extracted within South Africa is vested in the custodianship principle.⁴¹ The MPRRA states that a person must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of *mineral resources* extracted from within the Republic of South Africa.⁴² “Mineral resources” means a mineral or petroleum as defined in the MPRD Act.⁴³

In Namibia, the state is the owner of all petroleum resources *in situ*.⁴⁴ As owner, the state is entitled to charge royalty on the production of petroleum resources. As was discussed in Chapter Four above, however, the state acts as agent of the nation and has to ensure that the benefit ultimately accrues to its people.

The regulation of royalty in Namibia is not as detailed as the regulation of royalty in South Africa. For example, there is no separate legislation dealing with royalty.

³⁶ Cawood FT and MacFarlane AS “The Mineral and Petroleum Royalty Bill – Report to National Treasury” 2003 *The Journal of the South African Institute of Mining and Metallurgy* 213 at 231; Moolman (note 1) at 59.

³⁷ Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008.

³⁸ Petroleum (Exploration and Production) Act 2 of 1991.

³⁹ Section 13 of the Petroleum Act.

⁴⁰ See section 3(1) of the MPRD Act and Chapter Five above for a discussion of the meaning and extent of this section.

⁴¹ Dale et al (note 29) at MPRRA-1.

⁴² Section 2 of the MPRRA.

⁴³ See section 1 of the Mineral and Petroleum Resources Royalty Act 28 of 2008.

⁴⁴ See article 100 of the Namibian Constitution, section 2 of the Petroleum Act and Chapter Four above.

Royalty is cursorily dealt with under the Petroleum Act and expanded on to some extent in the petroleum agreement.

Before the introduction of the MPRRA, South Africa was one of the few countries in the world that did not impose a royalty on petroleum. By introducing the MPRRA, the South African regime was reformed to international norms and contributing to an attracting regulatory environment compared to the rest of the world.⁴⁵

Royalty in Namibia is not paid on the extraction of the resources, but only on the first transfer of the resource after extraction.⁴⁶ “Transfer” in the MPRRA means the disposal of the resource or the consumption, theft, destruction or loss of a petroleum resource (other than by way of flaring or other liberation into the atmosphere during exploration or production), if the petroleum resource has not previously been disposed of, consumed, stolen, destroyed or lost.⁴⁷

The obligation to pay royalty on the transfer of petroleum resources is not only placed on the holder of a production right.⁴⁸ It may also include the lessee or sub-lessee of the right, a person that wins petroleum unlawfully or any person who contractually accepted responsibility for the payment of the royalty.⁴⁹ However, only persons who extract petroleum for their own benefit is responsible for the payment of royalty on petroleum, which excludes contractors.⁵⁰ It also excludes holders of reconnaissance permits and exploration rights. The MPRRA refers to these persons collectively as ‘extractors’.⁵¹

Royalty is determined by multiplying the gross sales of the extractor (minus certain deductible expenses) in respect of the petroleum during the year of assessment by a specific percentage.⁵² The MPRRA prescribes different percentages in respect of

⁴⁵ Moolman (note 1) at 58.

⁴⁶ See Dale et al (note 29) at MPRRA-7.

⁴⁷ See section 1 of the MPRRA.

⁴⁸ Section 2 of the MPRRA refers to “a person” and not “a holder”. See Dale et al (note 29) at MPRRA-6.

⁴⁹ Dale et al (note 29) at MPRRA-6.

⁵⁰ Dale et al (note 29) at MPRRA-6.

⁵¹ Section 1 of the MPRRA. See also Cawood (note 16) at 28.

⁵² Section 3(1) and (2) of the Section 4(3) of the MPRRA.

refined and unrefined petroleum.⁵³ The percentages in respect of unrefined and refined petroleum are calculated as follows:⁵⁴

Unrefined Petroleum

$$0.5 + [A / (B \times 9)] \times 100$$

A = earnings before interest and taxes⁵⁵

B = gross sales in respect of the unrefined petroleum⁵⁶

Refined Petroleum

$$0.5 + [A / (B \times 12.5)] \times 100$$

A = earnings before interest and taxes⁵⁷

B = gross sales in respect of the refined petroleum⁵⁸

Although there is no fixed royalty rate, the MPRRA sets certain maximum rates.⁵⁹ To this effect, the maximum royalty percentage that may be levied on unrefined petroleum is 7% on the gross sales of unrefined petroleum, while the maximum royalty percentage that may be levied on refined petroleum is 5% on the gross sales of refined petroleum.⁶⁰ Furthermore, the MPRRA states that if earnings before interests and taxes (A in the formulae above) is a negative, that amount is deemed to be zero.⁶¹ If this is the case, the minimum royalty rates set out above will amount to 0.5%.⁶²

The formula set out above takes into account the petroleum company's profitability, while at the same time ensuring that a minimum royalty is payable to the state. In doing so, neither party is exponentially exposed to fiscal risk.⁶³ A reasonable trade-off is therefore achieved, which should encourage investment.

⁵³ Section 3(1) and (2) of the MPRRA. A "refined mineral resource" means a mineral resource listed solely in Schedule 1 of the MPRRA or listed in Schedule 1 and Schedule 2 that has been refined to or beyond the condition specified in Schedule 1 for that resource. An "unrefined mineral resource" means a mineral resource listed solely in Schedule 2 of the MPRRA or listed in Schedule 1 and Schedule 2 that has not been refined to or beyond the condition specified in Schedule 1 for that resource. See section 1 of the MPRRA. Petroleum, in terms of the MPRRA, is considered refined at the inlet of the refinery. Before that, it is considered unrefined. See section 1 of the MPRRA and Schedule 1 to the MPRRA.

⁵⁴ Section 4(1) and (2) of the MPRRA.

⁵⁵ Section 5 of the MPRRA defines in detail what is meant by "earnings before interest and taxes".

⁵⁶ Section 6 of the MPRRA discusses in detail the meaning of gross sales.

⁵⁷ Section 5 of the MPRRA defines in detail what is meant by "earnings before interest and taxes". See also Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 36-7 – 36-12.

⁵⁸ Section 6 of the MPRRA discusses in detail the meaning of gross sales.

⁵⁹ Section 4(3) of the MPRRA.

⁶⁰ Section 4(3) of the MPRRA.

⁶¹ Section 5(5) of the MPRRA.

⁶² Moolman (note 1) at 60.

⁶³ Van der Zaan and Nel (note 34) at 97.

The MPRRA contains certain rules countering the avoidance of paying royalty. For example, if the Commissioner of Inland Revenue is satisfied that a disposal, transfer, operation, scheme or understanding, which has the effect of avoiding or postponing liability for the royalty or of reducing the amount thereof, has been entered into or carried out, the Commissioner must determine the liability for the royalty as well as the amount thereof, as if the extractor had not entered into or carried out the relevant transaction.⁶⁴ Alternatively, the Commissioner may determine the liability for the royalty and the amount thereof as the Commissioner in the circumstances deems appropriate for the prevention or diminution of avoidance, postponement or reduction.⁶⁵

The same anti-avoidance rule applies to transactions entered into or carried out solely or mainly for the purposes of obtaining a royalty benefit.⁶⁶ Similarly, it also applies to transactions that would not normally be employed for *bona fide* business purposes, or which would not normally be employed in similar transactions.⁶⁷ Finally, it applies to transactions which have created rights or obligations which would not normally be created between persons dealing at arm's length.⁶⁸

Finally, the MPRRA deals specifically with foreign currency, but applies different rules to oil and gas companies than to other extractors. Any amount received by or accrued to an oil and gas company⁶⁹ in any foreign currency must be translated to South African Rand by applying the average exchange rate for the year in which that amount was so received or accrued.⁷⁰ On the other hand, amounts received by or accrued to an extractor in any foreign currency must be translated into South African Rand by applying the spot rate⁷¹ on the date on which that amount was so received or accrued to

⁶⁴ Section 12(1)(a) of the MPRRA.

⁶⁵ Section 12(1) of the MPRRA.

⁶⁶ Section 12(1)(c) of the MPRRA. "Royalty benefit" includes any avoidance, postponement or reduction of the liability for payment of the royalty. See section 12(3) of the section 12(1)(b)(i) of the MPRRA.

⁶⁷ Section 12(1)(b)(i) of the MPRRA.

⁶⁸ Section 12(1)(b)(i) of the MPRRA.

⁶⁹ As defined in paragraph 1 of the Tenth Schedule to the Income Tax Act 58 of 1962.

⁷⁰ Section 15(a) of the MPRRA.

⁷¹ See section 1 of the Income Tax Act.

the extractor.⁷² The same rule applies to expenditure or loss incurred by oil and gas companies and extractors.⁷³

In Namibia, royalty on petroleum resources is payable quarterly and not annually as is the case in South Africa.⁷⁴ Royalty is only payable by the holders of production licences.⁷⁵ It is unclear in the Namibian legislation whether this will include lessees, sublessees, persons who unlawfully produce petroleum or any person who contractually accepts liability for the payment of the petroleum.⁷⁶ However, nothing in the legislation or the petroleum agreement precludes these persons from paying royalty. The purpose of imposing royalty is to ensure that whoever extracts the petroleum shares the benefit thereof with the “owners” of the resource.⁷⁷ However, the obligation to pay royalty should vest with the entity who extracts the resource for its own benefit. Therefore, any person who is contracted by the holder of the licence to extract the petroleum on behalf of the holder would not be responsible for the payment of royalty on the petroleum extracted. The licence holder, however, should remain responsible for the payment of royalty.⁷⁸ Where the holder of a licence has transferred the right to extract petroleum to another person who is entitled to extract the petroleum for its own interest, the Petroleum Act is unclear as to whether the licence holder remains responsible for the royalty. It appears, however, that the holder of the licence remains responsible for the payment of royalty.⁷⁹ The transfer of the obligation to pay royalty should be dealt with in the contract in which the interests in the petroleum licence is transferred. This, as is stated above, is not prohibited by the Petroleum Act.

Royalty in Namibia is calculated on the market value, determined as provided for in the terms and conditions of the licence, of the petroleum produced and saved in the production area during each quarter.⁸⁰ This distinguishes the Namibian royalty regime from the South African royalty regime in two ways. First, in South Africa royalty is

⁷² Section 15(b) of the MPRRA.

⁷³ Section 15(a) and (b) of the MPRRA.

⁷⁴ Section 62(1) of the Petroleum Act.

⁷⁵ See section 62(1) of the Petroleum Act.

⁷⁶ See paragraph 2.1.1. above in respect of South Africa.

⁷⁷ See paragraph 3 above.

⁷⁸ This is supported by the fact that section 62(1) refers to the obligation of the *holder of the licence* to pay royalty.

⁷⁹ Section 62(1) of the Petroleum Act.

⁸⁰ Section 62(1) of the Petroleum Act.

determined based on the gross sales of the petroleum, while in Namibia it is based on the market value. Second, in Namibia royalty is payable on petroleum produced and saved during each quarter as opposed to South Africa, where royalty is payable on the first transfer of the petroleum.

Royalty in Namibia is charged at a fixed rate, unlike South Africa where the rate is calculated based on a prescribed formula. In Namibia, the rate at which royalty is charged depends on during which licensing round the licence was issued.⁸¹ Royalty on licences issued during the first and second licensing rounds (ie the licencing rounds before 1998) is charged at a rate of 12½% on the market value of the petroleum produced. Royalty on licences issued during the third and fourth licensing rounds (ie after 1998) as well as licences granted during the current, open-licensing system⁸² is charged at a rate of 5% of the market value of the petroleum produced. The market value is determined on the petroleum produced and saved, which is defined in the Model Petroleum Agreement as crude oil produced by the company under a production licence. It does not include any crude oil which has been unavoidably lost or lawfully used in connection with operations for the recovery of petroleum.⁸³

The Petroleum Act does not distinguish between royalty payable on refined and unrefined petroleum. The same rules therefore apply equally to refined and unrefined petroleum. However, since royalty is levied on petroleum produced and saved, it will be levied only on unrefined petroleum.

Because royalty in Namibia is charged at a fixed rate, this provides certainty to investors and the state enjoys the benefit of a fixed rate based on market value. When determining a royalty, however, the profitability of the company is not taken into account. As a result, in Namibia the petroleum company is exposed to a greater fiscal risk.⁸⁴

⁸¹ Section 62(1) of the Petroleum Act.

⁸² See Chapter Seven above.

⁸³ Clause 1.1(m) of the MPA.

⁸⁴ See paragraph 3.1.1 above.

3.2 Investor Relief and Incentives

The South African MPRRA contains various provisions relating to investor relief and incentives, which take the form of exemptions, rollover relief and fiscal stability agreements.⁸⁵ These provisions are included to strike a balance between the principle of levying a royalty and applying the royalty in a way that it will not trigger detrimental socio-economic consequences.⁸⁶ These provisions are important for attracting and keeping investors in the South African petroleum industry.

The MPRRA provides for the exemption of small businesses from paying royalty.⁸⁷ A “small business” is not defined, but the MPRRA provides for certain requirements that must be met before an extractor is exempt.⁸⁸ First, the gross sales of that extractor in respect of all transferred petroleum resources must not exceed R10 million during the year.⁸⁹ Second, the royalty that would be imposed for that year must not exceed R100,000.00.⁹⁰ Third, the extractor must, throughout the year, be a tax resident for purposes of income tax.⁹¹ Finally, the extractor must be registered for that year in terms of MPRRAA.⁹² Exemptions apply on an annual basis and are not once-off.⁹³

Under certain circumstances, small businesses who meet the requirements set out above are not exempted.⁹⁴ So, for example, an extractor is not royalty exempt if, during the applicable year, the extractor holds the right to participate either directly or indirectly in more than 50% of the share capital, share premium, current or accumulated profits or reserves of, or is entitled to exercise more than 50% voting rights in any other extractor.⁹⁵ The same applies when any other extractor at any time during the year holds the right to participate, either directly or indirectly, in more than 50% of the current or accumulated profits of the extractor⁹⁶ or in more than fifty percent of the

⁸⁵ For a full discussion, see Moolman (note 1).

⁸⁶ Van der Zaan and Nel (note 34) at 98.

⁸⁷ Section 7 of the MPRRA.

⁸⁸ Section 7(1) of the MPRRA.

⁸⁹ Section 7(1)(a) of the MPRRA.

⁹⁰ Section 7(1)(b) of the MPRRA.

⁹¹ Section 7(1)(c) of the MPRRA. See also section 1 of the Income Tax Act.

⁹² Section 7(1)(d) of the MPRRA.

⁹³ See section 7(1) of the MPRRA.

⁹⁴ Section 7(2) of the MPRRA.

⁹⁵ Section 7(2)(a) of the MPRRA.

⁹⁶ Section 7(2)(b) of the MPRRA.

profits of the extractor and more than 50% of the current or accumulated profits of any other extractor.⁹⁷ Finally, an extractor is not exempted from royalty if the extractor is a registered, unincorporated body of persons.⁹⁸

An extractor is exempt from paying royalty in respect of petroleum resources won or recovered by the extractor for purposes of testing, identification, analysis and sampling.⁹⁹ This exemption does not apply if the gross sales in respect of those petroleum resources exceed R100,000.00 during a year of assessment.¹⁰⁰

The MPRRA further provides for rollover relief from transfers between extractors¹⁰¹ and rollover relief for disposals involving going concerns (companies which continue to operate on the same basis after transfer).¹⁰² Rollover treatment basically enables any gain for the seller (whether capital or income) to be ignored. Any gain is effectively rolled over to the next owner.¹⁰³ An extractor that transfers petroleum resources to another extractor is exempt from paying royalty if the petroleum resource is transferred between registered extractors and both extractors agree in writing that this rollover provision applies to the transfer.¹⁰⁴ The transferee must be treated as the person who wins or recovers the resources.¹⁰⁵ Were it not for this clause, a possibly immense royalty liability would exist for any company wishing to exit the petroleum sector.¹⁰⁶

A disposal of petroleum resources by an extractor to another extractor that forms part of the disposal of a going concern is not deemed to be a disposal. The same applies to disposals forming a part of a going concern which is capable of separate operation.¹⁰⁷ The MPRRA states specific examples of transactions that are not deemed to be

⁹⁷ Section 7(2)(c) of the MPRRA.

⁹⁸ Section 7(2)(d) of the MPRRA with section 4 of the MPRRAA.

⁹⁹ Section 8 of the MPRRA.

¹⁰⁰ Section 8 of the MPRRA.

¹⁰¹ Section 8A of the MPRRA.

¹⁰² Section 9 of the MPRRA.

¹⁰³ Moolman (note 1) at 52.

¹⁰⁴ Section 8A(1) of the MPRRA. This rollover relief does not apply where the transferee is voluntarily elects to register for payment of royalty instead of being obliged to register in terms of the MPRRAA.

¹⁰⁵ Section 8A(2) of the MPRRA.

¹⁰⁶ Moolman (note 1) at 62.

¹⁰⁷ Section 9(1) of the MPRRA.

disposals.¹⁰⁸ The person who acquires the resources in terms of such a disposal is deemed to be the extractor that won or recovered the resource.¹⁰⁹

The MPRRA provides for the conclusion of fiscal stability agreements. This is particularly important in the light of the fact that petroleum operations may carry on for many years and may be subjected to fiscal regime changes. The Minister of Finance may conclude a fiscal stability agreement with an extractor in respect of the extractor's exploration or production rights or in anticipation of the extractor acquiring such a right.¹¹⁰ This agreement may guarantee certain terms and conditions which protects the extractor from increases in royalty rates.¹¹¹

An extractor who holds an exploration right may assign its rights in terms of a fiscal stability agreement if it disposes of the exploration right.¹¹² However, if the extractor holds a production right, it may only assign its rights under the fiscal stability agreement if the entity to whom the right is disposed to forms part of the same group of companies than the extractor.¹¹³

The provisions relating to fiscal stability agreements in the MPRRA operate more in the favour of the extractor than the state. So, for example, an extractor who is party to a fiscal stability agreement may unilaterally terminate the agreement at any time.¹¹⁴ The same right is not granted to the state. Furthermore, if the state fails to comply with the terms and conditions of a fiscal stability agreement and the failure has a material adverse economic impact on the determination of the royalty payable by the extractor, the extractor is entitled to compensation in respect of the increase in the royalty caused by the failure or an alternative remedy that eliminates the full impact of the failure.¹¹⁵ The extractor is also entitled to interest on the compensation.¹¹⁶

¹⁰⁸ Section 9(1A) of the MPRRA.

¹⁰⁹ Section 9(2) of the MPRRA.

¹¹⁰ Section 13(1) of the MPRRA.

¹¹¹ Section 13(1) and section 14(1) of the MPRRA.

¹¹² Section 13(3) of the MPRRA.

¹¹³ Section 13(4) of the MPRRA.

¹¹⁴ Section 13(5) of the MPRRA.

¹¹⁵ Section 14(2) of the MPRRA.

¹¹⁶ Section 14(2) of the MPRRA.

The effect of relief in the form of fiscal stability agreements is that a binding agreement may be entered into between the Department of Mineral Resources and the petroleum company. This would result in a flexible system by providing a guarantee to the petroleum company that adverse changes by the state in the rate of royalty to be imposed would not affect the petroleum company.¹¹⁷

The Namibian Petroleum Act contains some provisions relating to investor relief and incentives in respect of royalty. Unlike South Africa, however, no provision is made in the Petroleum Act for anti-avoidance, fiscal stability agreements or payment in foreign currency. The only relief provided for in Namibia is remission and deferment of royalty.¹¹⁸

Remission and deferment of royalty, unlike the exemption in South Africa, are not limited to small businesses but can be used by any production licence holder. To this extent, the Petroleum Act states that the Minister of Mines and Energy, in concurrence with the Minister of Finance, may on application to him by a production licence holder, by notice in writing remit wholly or partly any royalty payable or defer payment of royalty.¹¹⁹ The Minister may also, with the concurrence of the Minister of Finance and on application to him by the licence holder, refund wholly or partly any royalty paid.¹²⁰ A remittance, deference or refund must be granted on such conditions as may be determined by the Minister and specified in the notice.¹²¹ The Minister is under no obligation to grant the application for remittance, deference or refund.¹²²

In adhering to the principles of transparency and accountability, the Minister must on or before 30 June in each year lay a report upon the table of the National Assembly, which must consist of the names of holders of licences in respect of whom royalty was remitted or refunded or of whom payment of royalty was deferred during the financial year which ended in that year. The report must also state the amounts involved and the

¹¹⁷ Van der Zaan and Nel (note 34) at 98.

¹¹⁸ Section 63 of the Petroleum Act.

¹¹⁹ Section 63(1)(a) of the Petroleum Act.

¹²⁰ Section 63(1)(b) of the Petroleum Act.

¹²¹ Section 63(1) of the Petroleum Act.

¹²² Section 63(1) of the Petroleum Act.

reasons for such remission, refund or deferment.¹²³ The fact that reasons are required ensures that the Minister also acts openly, fairly and reasonably.

3.3 Comparative Assessment

Both South Africa and Namibia provide for the payment of petroleum royalty. In South Africa, the royalty is paid on the first transfer of the petroleum. In Namibia, it is payable quarterly on the market value of the petroleum produced and saved. Another difference between the two regimes is that South Africa calculates petroleum royalty on the gross sales of petroleum, while Namibia bases it on the market value. Both systems, however, base their royalty on the value of the petroleum. One result is that a higher return rate for the state is achieved than if it was based on, for example, net smelter return instead of the gross sales or petroleum produced and saved.¹²⁴ A further result is that royalty is payable whether the petroleum company is operating at a loss or for profit.¹²⁵ The benefit gained by the state is therefore not subject to the performance of the company as with income tax. In South Africa, the interests of the petroleum company is, however, protected in that the formula used for determining the rate of royalty takes into account the profitability of the company, but a minimum royalty is still payable. In Namibia, this is not the case. The downside for the state where royalty is payable on the value of the petroleum, however, is that the royalty recovered will be affected by commodity prices.¹²⁶

In South Africa, the royalty rate is not fixed but is determined based on a formula prescribed by the MPRRA. Namibia, on the other hand, prescribes a fixed rate. While this may provide more certainty, the formula contained in the MPRRA provides more flexibility as it is influenced by earnings before interests and taxes and gross sales.

Both countries provide certain investor relief in respect of royalty. So, for example, in Namibia a holder may apply for remission and deferment of royalty. In South Africa, the holder may apply for exemption from paying royalty. This, however, only applies to small businesses, whereas in Namibia any company may apply for remission and

¹²³ Section 63(2) of the Petroleum Act.

¹²⁴ Moolman (note 1) at 61.

¹²⁵ Otto et al (note 25) at 52.

¹²⁶ Otto et al (note 25) at 52.

deferment. South Africa provides for further relief in the form of fiscal stability agreements, which may be negotiated with the state and which will provide proper protection for the investor against changes in legislation. Similar relief is not available in Namibia.

The table below briefly compares the South African and Namibian royalty regimes in respect of petroleum. Both systems generally operate in the same manner, but there are major differences between the two, especially regarding *how* royalty is determined and what *relief and incentives* are offered for investors. Both systems have a favourable royalty rate compared to other jurisdictions.¹²⁷ South Africa, however, has more provisions in place providing relief and incentives for the investors than Namibia.

Obligation to Pay Royalty				Investor Relief and Incentives
	<i>Basis for Determination</i>	<i>When Payable</i>	<i>Royalty Rate</i>	
South Africa	Gross sales	On first transfer	Determined using formula for refined and unrefined petroleum	<ol style="list-style-type: none"> 1. Exemption for small businesses 2. Rollover relief for transfers between extractors 3. Rollover relief for transfers as going concern 4. Fiscal stability agreements
Namibia	Market value	Quarterly on petroleum produced and saved	Fixed, depending on licencing round (5% for current licencees)	<ol style="list-style-type: none"> 1. Remission and deferment of royalty

Figure 6: Petroleum Royalty in South Africa and Namibia

4. Petroleum Taxation

In addition to the levy of royalty on petroleum, both South Africa and Namibia also levy specific taxes on petroleum operations. The way in which resources are taxed can have a powerful impact on the political and economic fate of resource-rich countries.¹²⁸

¹²⁷ See for example Moolman (note 1) at 60.

¹²⁸ Daniel P, Keen M and McPherson C "Introduction" in Daniel P, Keen M and McPherson C (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) London Routledge at 1.

As stated above, the taxation of petroleum production is an effective way of ensuring that the host nation benefits from the exploitation of its petroleum resources. In theory, petroleum taxation is the means by which rewards from petroleum is divided between the investor and the government.¹²⁹

Despite the above, over-taxation may scare off investors, causing the resources to remain unexploited and no benefit being received from it. Investors interested in exploiting the petroleum resources must also get something in return for their investments. A balance must therefore be struck between the right of the investors and the right of the people of the host country.

4.1 Direct Taxes

Petroleum exploitation in South Africa attract various taxes. These taxes may be grouped under two categories, namely direct taxes and indirect taxes.¹³⁰ Direct taxes are income tax, withholding tax and capital gains tax.¹³¹ Indirect taxes are Value-Added Tax and customs duties or import tariffs.¹³² In Namibia as in South Africa, petroleum operations attract various taxes. The taxes in Namibia may also be divided under the headings direct and indirect taxes. Indirect taxes in Namibia are the same as for South Africa except that Namibia also imposes stamp duties on certain transactions. The applicable direct taxes in Namibia are only income tax and withholding tax. The focus here is only on direct taxes.

4.1.1 Income Tax

In South Africa, there is no separate legislation dealing with the taxation of income derived from petroleum operations. The over-all taxation of income of petroleum companies is dealt with in terms of the general income tax legislation of South Africa.¹³³ The taxable income of any oil and gas company must be determined in accordance with the provisions of the Income Tax Act, but subject to the provisions of

¹²⁹ Nakhle (note 7) at 7.

¹³⁰ Here I follow the grouping of Eastwood W and Rawoot N “South Africa” 2013 Oil and Gas Tax Guide for Africa 2013 http://www.pwc.com/en_GX/gx/oil-gas-energy/publications/pdfs/pwc_oil_and_gas_tax_guide_for_africa_2013.pdf [accessed 02.02.2014].

¹³¹ See Eastwood and Rawoot (note 118) at 105–107.

¹³² See Eastwood and Rawoot (note 118) at 107–108.

¹³³ Dale et al (note 29) at MPRD-22.

the Tenth Schedule to the Income Tax Act.¹³⁴ The Income Tax Act and the Tenth Schedule also provides for certain incentives for investors.

Before the Tenth Schedule came into operation on 2 November 2006, the main body of the Income Tax Act applied to the taxation of income derived from the production of natural oil.¹³⁵ The section dealing with this, however, was amended or deleted and replaced by the Tenth Schedule, which aims at providing for a more favourable treatment of oil and gas companies and which is aimed at encouraging investment.¹³⁶ The state's intention with the Tenth Schedule is to provide more deductions, stability and greater transparency.¹³⁷ The discussion in this part is only focused on the specific provisions of the income tax regime in South Africa on petroleum companies. The Tenth Schedule, however, is not the only instrument imposing a tax obligation on petroleum companies. Other tax obligations will not be discussed.¹³⁸

The Tenth Schedule does not apply to all income of oil and gas companies,¹³⁹ but only to that part of the income attributed to oil and gas income. "Oil and gas income" mean the receipts and accruals derived by an oil and gas company from exploration, production or the leasing or disposal of any oil and gas right. Other income derived by an oil and gas company is taxed in terms of the general provisions of the Income Tax Act. The rate of tax on taxable income attributed to oil and gas income of any oil and

¹³⁴ Section 26B(1) of the Income Tax Act 58 of 1962.

¹³⁵ Olivier L, Engels R, Roeleveld J, Wessels H, Davis D and Urquhart G *Juta's Income Tax* (2012 Revision Service 17) Claremont Juta & Co Ltd at Sch 10-1.

¹³⁶ Olivier et al (note 123) at Sch 10-1.

¹³⁷ Moolman (note 1) at 56.

¹³⁸ For a full discussion, see Moolman (note 1).

¹³⁹ An "oil and gas company" for purposes of the Act refers to any company that holds any oil and gas right. An "oil and gas right" in turn refers to any right to petroleum issued under the MPRD Act or any interest in a right to petroleum. Therefore, any company that holds a reconnaissance permit, technical co-operation permit, exploration right or production right is an oil and gas company for purposes of the Income Tax Act. In terms of the Tenth Schedule to the Income Tax Act, any company that engages in exploration or production in terms of any oil and gas right is also an "oil and gas company" for purposes of the Income Tax Act. This may either refer to a company holding an oil and gas right and conducting exploration or production operations, or a company that does not hold an oil and gas right, but is entitled to explore for or produce oil and gas in terms of any oil and gas right. This right may be obtained in any of the methods contemplated in the MPRD Act. This part of the definition of oil and gas companies is limited to companies conducting exploration or production operations in terms of any exploration or production right only. Since it is not possible to transfer any interest in a reconnaissance permit, no company can conduct reconnaissance operations in terms of a reconnaissance permit held by another company. As regards technical co-operation permits, no exploration or production may be conducted in terms of any technical co-operation permit. See section 1 of the Tenth Schedule to the Income Tax Act 58 of 1962.

gas company may not exceed 28 cents on each rand of taxable income,¹⁴⁰ which is the normal rate for companies in South Africa.¹⁴¹ Despite the fact that the Tenth Schedule provides more favourable treatment for petroleum companies, the rate at which oil and gas income is taxed is still similar to other companies, thus there is no favourable treatment with regard to the rate at which income is taxed.¹⁴² As such, it does not operate to attract investors.¹⁴³ Other income derived by an oil and gas company not attributable to its oil and gas income is taxed in terms according to normal corporate tax rates laid down in the Income Tax Act.

The Tenth Schedule also sets out certain rules regarding thin capitalisation. The purpose of thin capitalisation provisions is to prevent taxpayers from deducting interests in respect of excessive amounts of “connected party” debt in certain circumstances.¹⁴⁴ When calculating the taxable income of an oil and gas company during any year of assessment, the Commissioner may not refuse to allow a deduction of an expenditure in respect of loans, advances and debts or any other financial assistance on the grounds that they are excessive in relation to the market value of all the shares in the oil and gas company.¹⁴⁵ If, however, an interest-bearing loan, advance or debt was owed during the year of assessment by the oil and gas company to any entity that is not connected to the company and these loans, debts and advances in the aggregate exceed an amount equal to three times the market value of all the shares in the company, then the Commissioner may refuse to allow the company to deduct these loans, advances or debts.¹⁴⁶ In short, a safe harbour is provided for oil and gas companies in terms whereof no adjustment should be made provided that the interest-bearing debt in question does not exceed three times the market value of the shares of the South African borrower.¹⁴⁷ This safe harbour is, however, replaced with effect from 01 January 2014 with an arm’s-length test.¹⁴⁸

¹⁴⁰ Section 2 of the Tenth Schedule to the Income Tax Act 58 of 1962.

¹⁴¹ Moolman (note 1) at 45.

¹⁴² Moolman (note 1) at 45.

¹⁴³ Moolman (note 1) at 45.

¹⁴⁴ Eastwood and Rawoot (note 118) at 107.

¹⁴⁵ Section 6(1) of the Tenth Schedule to the Income Tax Act.

¹⁴⁶ Section 6(1) of the Tenth Schedule to the Income Tax Act.

¹⁴⁷ Eastwood and Rawoot (note 118) at 107.

¹⁴⁸ Eastwood and Rawoot (note 118) at 107; the Taxation Laws Amendment Act 22 of 2012.

As with the South African income tax legislation, the taxation of petroleum companies in Namibia used to be dealt with in terms of the Income Tax Act 24 of 1981. However, when the Petroleum (Taxation) Act came into operation, it removed or amended all provisions in the Income Tax Act specifically dealing with the taxation of petroleum companies and in turn consolidated the taxation of petroleum income in a separate act. The Income Tax Act does not apply to income taxable under the Petroleum (Taxation) Act.¹⁴⁹ The Namibian approach is in line with the approach in other jurisdictions, such as the UK,¹⁵⁰ where a separate act deals with the taxation of petroleum operations.¹⁵¹

The Petroleum (Taxation) Act provides for two types of taxes, namely a petroleum income tax (“**PIT**”) and an additional profits tax (“**APT**”).¹⁵² A PIT is payable in respect of taxable income¹⁵³ received by or accrued to or in favour of any person from a licence area in connection with exploration operations, development operations or production operations carried out in any tax year in such licence area.¹⁵⁴ When the Petroleum Tax Act was first implemented, the rate of PIT to be levied was 42% of the taxable income. This rate applied to licensing rounds one and two.¹⁵⁵ The Petroleum Tax Act was amended in 1998 and the new rate, namely 35% of the taxable income, applies to licensing rounds three and four.¹⁵⁶ The Petroleum (Taxation) Act provides comprehensively for the determination of gross income and¹⁵⁷ allowable deductions.¹⁵⁸ It furthermore provides for expenditures incurred outside Namibia,¹⁵⁹ double

¹⁴⁹ Section 2(a) of the Petroleum (Taxation) Act 3 of 1991.

¹⁵⁰ Oil Taxation Act of 1975.

¹⁵¹ Alramahi M *Oil and Gas Law in the UK* (2013) West Sussex Bloomsbury Professional Limited at §2.37.

¹⁵² APT is also levied in Algeria and Papua New Guinea. See Ernst & Young *Global Oil and Gas Tax Guide 2014* Ernst & Young (available at [http://www.ey.com/Publication/vwLUAssets/EY-Global-oil-and-gas-tax-guide-2014/\\$FILE/EY-Global-oil-and-gas-tax-guide-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Global-oil-and-gas-tax-guide-2014/$FILE/EY-Global-oil-and-gas-tax-guide-2014.pdf) [accessed 13.01.2015] at 1 and 419.

¹⁵³ “Taxable income” means the amount remaining after deducting from the gross income of any person all allowable deduction and all allowable losses. See section 1 of the Petroleum (Taxation) Act.

¹⁵⁴ Section 5(1) of the Petroleum (Taxation) Act.

¹⁵⁵ These were the first two licensing rounds before 1998.

¹⁵⁶ Section 6 of the Petroleum (Taxation) Act.

¹⁵⁷ Section 7 of the Petroleum (Taxation) Act.

¹⁵⁸ Sections 8 to 13 of the Petroleum (Taxation) Act.

¹⁵⁹ Section 14 of the Petroleum (Taxation) Act.

deductions,¹⁶⁰ expenditure incurred in connection with agreements between persons associated with each other¹⁶¹ and allowable losses.¹⁶²

APT is determined in accordance with the provisions of the Petroleum (Taxation) Act using a “complex formula”.¹⁶³ It is determined in respect of the first, second and third “accumulated net cash positions”, which are three cumulative cash flow positions after normal tax, based on net cash receipts from petroleum operations in each licence area separately. In short, it is levied on after-tax net cash flows from petroleum operations.¹⁶⁴ APT will only be paid if the petroleum operations in a licence area earn an after-tax real rate of return of 15%. The second and third tiers of APR become payable once the profitability level exceeds 20% and 25% respectively.¹⁶⁵ It is therefore an additional tax payable on profitable companies.

The first rate of APT is established at 25% (for the existing Kudu licence it is 33%). However the incremental second and third tier APT rates are biddable and negotiable with each prospective investor consortium and the agreed rates will be set out in the respective Petroleum Agreement.¹⁶⁶

It is possible to vary or modify the formula for determining APT.¹⁶⁷ This may be done in the petroleum agreement in relation to production sharing or participation by Namcor.¹⁶⁸ Here, the legislature provides an incentive for licence holders in exchange for local participation through the state petroleum company Namcor or a share in the produced petroleum. It may also be done in any agreement entered into between the holder of a licence and the Government which provides for the development of a discovery of petroleum in gaseous form.¹⁶⁹

¹⁶⁰ Section 16 of the Petroleum (Taxation) Act.

¹⁶¹ Section 17 of the Petroleum (Taxation) Act.

¹⁶² Section 18 of the Petroleum (Taxation) Act.

¹⁶³ Clegg D and Kotze C *LexisNexis Practical Guide to Tax in Namibia* 8 ed (2012) Durban LexisNexis at 74.

¹⁶⁴ Ernst & Young (note 152).

¹⁶⁵ See sections 19 to 21 of the Petroleum (Taxation) Act and Clegg and Kotze (note 175) at 74–75.

¹⁶⁶ Section 21 of the Petroleum (Taxation) Act.

¹⁶⁷ Section 22 of the Petroleum (Taxation) Act.

¹⁶⁸ Section 22(a) of the Petroleum (Taxation) Act.

¹⁶⁹ Section 22(b) of the Petroleum (Taxation) Act.

In terms of the Petroleum (Taxation) Act, the majority of the provisions of the Income Tax Act 24 of 1981 apply to petroleum companies insofar as they relate to returns, assessments, objections and appeals payment and recovery of tax, representative taxpayers, refunds and other miscellaneous matters.¹⁷⁰ Furthermore, the provisions relating to the administration of the Income Tax Act applies to the Petroleum (Taxation) Act as well.¹⁷¹

4.1.2 Withholding Tax

In South Africa, various withholding taxes are payable by oil and gas companies. A royalty withholding tax of 15% is levied for the benefit of the National Revenue Fund on the amount of royalty payable by any person to a non-resident for the use of certain intellectual property.¹⁷² The same applies to payments for certain scientific, technical, industrial or commercial knowledge or information or related assistance.¹⁷³ Similarly, a withholding tax of 15% is levied for the benefit of the National Revenue Fund on South African sourced interest payable to non-residents on certain debt instruments.¹⁷⁴

The Income Tax Act also provides for the payment of a withholding tax on any dividend paid by a company.¹⁷⁵ Normally, the withholding tax on dividends is calculated at 15% of the amount paid, but in terms of the Tenth Schedule, the rate may not exceed 5% of the amount of any dividend paid by an oil and gas company out of amounts attributable to its oil and gas income.¹⁷⁶

The Income Tax Act applicable in Namibia provides for various withholding taxes. These provisions are made applicable to petroleum companies by the Petroleum (Taxation) Act.¹⁷⁷ The first type of withholding tax is a withholding tax on interest. In terms of the Income Tax Act, a withholding tax on interest at a rate of 10% of any

¹⁷⁰ Section 23 of the Petroleum (Taxation) Act.

¹⁷¹ Section 4 of the Petroleum (Taxation) Act.

¹⁷² Section 49B(1) of the Income Tax Act; Eastwood and Rawoot (note 118) at 109.

¹⁷³ Section 49A of the Income Tax Act 58 of 1962; Eastwood and Rawoot (note 118) at 109.

¹⁷⁴ Section 37J of the Income Tax Act; Eastwood and Rawoot (note 118) at 109.

¹⁷⁵ Section 64E of the Income Tax Act.

¹⁷⁶ Section 3(1) of the Tenth Schedule to the Income Tax Act 58 of 1962.

¹⁷⁷ Section 23 of the Petroleum (Taxation) Act.

amount of interest from a banking institution or unit trust scheme is payable for the benefit of the State Revenue Fund.¹⁷⁸

Aside from withholding tax on interest, there is also a non-resident shareholder tax (“NRST”). In terms of the Income Tax Act, a NRST is payable for the benefit of the State Revenue Fund in respect of the amount of any dividend which has been declared by any company to a non-resident shareholder.¹⁷⁹ The rate of the NRST is 10% if the beneficial owner of the shares is a company which holds directly or indirectly at least 25% of the capital of the company paying the dividends.¹⁸⁰ In all other cases the rate is 20%.¹⁸¹ The Petroleum (Taxation) Act, however, states that notwithstanding the provisions of the Income Tax Act, there is no withholding tax levied on the dividends paid out of oil and gas revenues.¹⁸² This is one example where the legislature has created a more favourable position for petroleum companies in respect of its taxation obligations.

As with South Africa, a withholding tax on royalty is also payable. The Income Tax Act states that any person liable to pay a royalty on intellectual property to a foreign person or company must deduct a royalty tax of 30% from the amount payable.¹⁸³

Finally, a withholding tax of 25% is payable on the payment of management fees, consultancy fees, entertainment fees or directors’ fees by a Namibian resident to a non-resident.¹⁸⁴ This withholding tax has caused concern to petroleum operators, as most of the services used by petroleum companies are sources from outside Namibia.¹⁸⁵

¹⁷⁸ Section 34A(1) of the Income Tax Act.

¹⁷⁹ Section 42(1) of the Income Tax Act.

¹⁸⁰ Section 45(a) of the Income Tax Act.

¹⁸¹ Section 45(b) of the Income Tax Act.

¹⁸² Section 2(b) of the Petroleum (Taxation) Act.

¹⁸³ Section 35(2) of the Income Tax Act.

¹⁸⁴ Section 35A of the Income Tax Act.

¹⁸⁵ Radiowave “Petroleum Operations Concerned with Tax Proposals” available at <http://www.radiowave.com.na/index.php/news/dailynews/2879-petroleum-operators-concerned-with-tax-proposals> [accessed 02.02.2014].

4.1.3 Capital Gains Tax

Capital gains tax (“CGT”) is a form of income tax introduced in South Africa in 2001 in order to bring the South African tax regime in line with international benchmarks.¹⁸⁶ Namibia does not have CGT.

A capital gain arises when a company disposes of an asset for proceeds that exceed its base costs.¹⁸⁷ “Base cost” in essence consists of the costs of acquisition of the asset plus certain categories of other expenditure, for example transfer costs, stamp duties, transfer duties or similar costs.¹⁸⁸ South Africa’s CGT system applies to the world-wide assets of a South African resident.¹⁸⁹

CGT are determined in accordance with the Eighth Schedule to the Income Tax Act, although this Schedule does not expressly refer to CGT.¹⁹⁰ In terms of the Income Tax Act, there must be included in the taxable income of a person the capital gain of that person for the year of assessment.¹⁹¹ As a result, the taxable capital gain is aggregated with other taxable income and taxed according to ordinary income tax rates.¹⁹² It is therefore onerous on the petroleum company in that it is taxed on this gain.

Only a certain portion of a person’s net capital gain is included in the taxable income.¹⁹³ The taxable capital gain for the year of assessment for a company is 50%.¹⁹⁴ An assessed capital loss, however, cannot be set-off against ordinary income, but is ring-fenced and can only be set-off against capital gains arising during future years of assessment.¹⁹⁵

¹⁸⁶ Croome B, Oguttu A, Muller E, Legwaila T, Kolitz M, Rilliams RC and Louw C *Tax Law: An Introduction* (2013) Cape Town Juta & Co Ltd at 334.

¹⁸⁷ See SARS “Capital Gains Tax” available at <http://www.sars.gov.za/TaxTypes/CGT/Pages/default.aspx> [accessed 02.02.2014].

¹⁸⁸ Olivier et al (note 123) at Sch 8 overview-3.

¹⁸⁹ Croome et al (note 186) at 336.

¹⁹⁰ Section 26A of the Income Tax Act; Croome et al (note 186) at 335.

¹⁹¹ Section 26A of the Income Tax Act.

¹⁹² Olivier et al (note 123) at 26A-1.

¹⁹³ Olivier et al (note 123) at Sch 8 para 10-1.

¹⁹⁴ Section 10(c) of the Eighth Schedule to the Income Tax Act.

¹⁹⁵ Olivier et al (note 123) at 26A-1.

4.2 Investor Relief and Incentives

The Tenth Schedule to the South African Income Tax Act specifically provides for fiscal stability and allowable deductions for petroleum companies. These measures act in favour of the investor.

A fiscal stability provision is important to facilitate future investment¹⁹⁶ Not only does it grant the necessary protection of the the interests of the petroleum company,¹⁹⁷ it also operates in favour of the host state, which will have certainty as to the revenue that will be collected.¹⁹⁸ Stability is “an intangible yet crucial attribute of a fiscal regime”.¹⁹⁹ Fiscal stability is central to a petroleum company’s confidence in the host country,²⁰⁰ especially in the light of the company’s long-term exposure to the risks involved in petroleum exploitation.²⁰¹ Under regimes whereby access to petroleum resources is granted through a concession or production sharing contract, stabilization clauses are usually incorporated into the relevant agreement and enforceable under international law.²⁰² The absence of fiscal stability, although often damaging to a petroleum company’s confidence in the host country, is not necessarily a deal-breaker. Where fiscal stability cannot be guaranteed and fiscal regimes are unstable, the petroleum company may instead be compensated by the host country in other ways, such as competitive tax levels, as is the case in the United Kingdom.²⁰³ In Norway, on the other hand, the fiscal regime is much more stable, but the tax levels are high.²⁰⁴

In South Africa, fiscal stability is left to the discretion of the Minister of Finance. In terms of the Tenth Schedule, the Minister of Finance may enter into a binding agreement with any oil and gas company in respect of an oil and gas right held by that company, which agreement must guarantee that the provisions of the Tenth Schedule as at the date of conclusion will apply in respect of that right for as long as the right is held

¹⁹⁶ Moolman (note 1) at 54. See also Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 16.

¹⁹⁷ Onorato (note 196) at 20.

¹⁹⁸ Nakhle (note 7) at 115.

¹⁹⁹ Nakhle (note 7) at 114.

²⁰⁰ Nakhle (note 7) at 114.

²⁰¹ Coale (note 19) at 219.

²⁰² Coale (note 19) at 222; Nakhle (note 7) at 115.

²⁰³ Nakhle (note 7) at 114.

²⁰⁴ Nakhle (note 7) at 114.

by the company.²⁰⁵ The Minister may also enter into a fiscal stability agreement on the same terms before the right is granted, provided that the oil and gas company is granted the right within one year after date of execution of the agreement.²⁰⁶

If an oil and gas company who is party to a fiscal stability agreement decides to dispose of its exploration right, it may as part of that disposal assign all of its fiscal stability rights in terms of the agreement to the other oil and gas company.²⁰⁷ The same only applies in respect of the disposal of a production right if the other oil and gas company is a company within the same group of companies.²⁰⁸

An oil and gas company party to a fiscal stability agreement may at any time unilaterally terminate the agreement.²⁰⁹ For example, should the actual tax rates be less than guaranteed in terms of the fiscal stability agreement, the petroleum company may cancel the agreement to benefit from the lower, prevailing rates. The same termination right is not granted to the state, probably because the provisions of such an agreement operate in favour of the oil and gas company and not the state. If the state, however, fails to comply with the terms of the agreement and the failure has a material adverse economic impact on the taxation of income or profits of the company, the company is entitled to compensation for the loss of the market value caused by the failure of the state or to other appropriate relief.²¹⁰

The Petroleum (Taxation) Act does not provide for any fiscal stability. The rate at which PIT is levied is stated in the Petroleum (Taxation) Act. As a result, it may be amended by unilateral decision of the state. The rate at which APT is levied, however, is fixed in terms of the petroleum agreement which the company must enter into with the state.

Aside from fiscal stability, the Income Tax Act and the Tenth Schedule makes provision for specific allowable deductions when determining the taxable income of an

²⁰⁵ Section 8(1)(a) of the Tenth Schedule to the Income Tax Act.

²⁰⁶ Section 8(1)(b) of the Tenth Schedule to the Income Tax Act.

²⁰⁷ Section 8(2)(a) of the Tenth Schedule to the Income Tax Act.

²⁰⁸ Section 8(2)(b) of the Tenth Schedule to the Income Tax Act.

²⁰⁹ Section 8(4) of the Tenth Schedule to the Income Tax Act.

²¹⁰ Section 8(6) of the Tenth Schedule to the Income Tax Act.

oil and gas company.²¹¹ All expenditure and losses actually incurred (other than expenditure or loss actually incurred in respect of the acquisition of any oil and gas right) may be deducted.²¹² In addition, an oil and gas company may also deduct one 100% of all expenditure of a capital nature actually incurred in respect of exploration during the year of assessment and 50% of all expenditure incurred in respect of production.²¹³ This acts as an incentive for petroleum companies to incur significant amounts of high-risk capital expenditure that probably represents long-term sunken capital.²¹⁴

Assessed losses in respect of exploration and production may be set off against the oil and gas income and the income derived from the refining of gas derived in respect of any oil and gas right held by that company, but only to the extent those assessed losses do not exceed that income.²¹⁵ If any assessed losses remain after set-off, an amount equal to 10% of those remaining assessed losses may be set-off against any other income derived by that company.²¹⁶ If any assessed losses still remaining after the set-off against the other income of the company, those losses must be carried forward to the succeeding year of assessment.²¹⁷

The Petroleum (Taxation) Act also provides for deductions. Aside from general deductions typically allowed, the Petroleum (Taxation) Act specifically provide for the deduction of petroleum royalty, interest on borrowings employed in connection with the licence area concerned and restoration and rehabilitation expenditure to the extent specified in terms of a licence.²¹⁸ Under certain circumstances, exploration and development expenditure may be written off.²¹⁹

²¹¹ See in detail Moolman (note 1) at 46–50.

²¹² Section 5(1) of the Tenth Schedule to the Income Tax Act.

²¹³ Section 5(2) of the Tenth Schedule to the Income Tax Act.

²¹⁴ Moolman (note 1) at 46.

²¹⁵ Section 5(3) of the Tenth Schedule to the Income Tax Act.

²¹⁶ Section 5(4) of the Tenth Schedule to the Income Tax Act.

²¹⁷ Section 5(5) of the Tenth Schedule to the Income Tax Act.

²¹⁸ See section 8 of the Petroleum (Taxation) Act.

²¹⁹ Section 9 of the Petroleum (Taxation) Act.

4.3 Comparative Assessment

The distribution of benefits from natural resources is at the centre of many natural resource taxation policies.²²⁰ This also shows in the taxation of petroleum income in both South Africa and Namibia. At first, the general income tax legislation of these two countries (in South Africa the main body of the Income Tax Act) dealt with the taxation of income derived from petroleum activities. However, in an attempt to encourage investment and to provide more favourable treatment for petroleum companies, the treatment of petroleum taxation was removed from the general income tax legislation. In South Africa, the Tenth Schedule to the Income Tax Act is now dedicated solely to the taxation of oil and gas income. Namibia has gone one step further and enacted entirely separate legislation to deal with petroleum taxation.

Despite generally providing for a more favourable taxation regime in respect of petroleum companies, the South African and Namibian governments still recognise the importance of imposing taxes on the income derived from petroleum operations. To this effect, a petroleum income tax is levied in both countries. Aside from petroleum income tax, both countries also levy various withholding taxes. Furthermore, in South Africa CGT are also levied on the transfer of certain assets. Namibia does not have CGT. However, Namibia imposes a further tax on petroleum operations, namely APT.

Certain measures are, however, put in place for the benefit of the investor. So, for example, the Tenth Schedule in South Africa provides for a maximum rate at which petroleum income may be taxed, namely 28%. Namibia also fixes the PIT rate at 35%. This is, however, a small comfort. Because these rates are fixed in legislation, it can be changed again by the legislature. To counter this possibility, the Tenth Schedule provides for the possibility of negotiating a fiscal stability agreement to protect the investor. Fiscal stability is a very important incentive to attract investors, who need to be sure that they will not be subject to changes in legislation at the whim of the host state. No similar provision is made in Namibia.

Another measure put in place for the benefit of the investor relates to the withholding tax on dividends payable to non-residents of Namibia and South Africa. In the Tenth

²²⁰ Nakhle (note 8) 8.

Schedule, a reduced rate of 5% is provided for. Namibia is even more favourable and states that no withholding tax on dividends is payable in respect of dividends paid out of oil and gas revenues.

Finally, the petroleum taxation legislation recognises the distinctiveness of petroleum operations. Various deductions and set-offs unique to petroleum operations are allowed in both South Africa and Namibia. For example, exploration and development costs are allowable deductions.

Despite the above, there are measures that do not operate in favour of the investor. So, for example, the withholding tax on services in Namibia (set at a very high 25%) will have serious consequences on petroleum operators, who make use mostly of foreign services. One may argue that this withholding tax will encourage petroleum operators to use local services. However, as stated on a number of occasions throughout this thesis, the petroleum industry requires highly skilled services that may not be available in the host country. It is, however, still too early to measure the effect of this tax on petroleum operations. It also appears as if South Africa is intending to impose a similar withholding tax.²²¹

²²¹ KPMG “Update on South Africa Withholding Taxes” available at <http://www.kpmg.com/za/en/issuesandinsights/articlespublications/tax-and-legal-publications/pages/update-on-south-africa-withholding-taxes.aspx> [accessed 02.02.2014].

Direct Taxes				Investor Relief and Incentives
	<i>Income Tax</i>	<i>Withholding Tax</i>	<i>CGT</i>	
South Africa	<ul style="list-style-type: none"> Payable in terms of Income Tax Act, subject to Tenth Schedule Tenth Schedule only applicable to oil and gas income; other income subject to normal tax Rate of tax may not exceed 28% 	<ul style="list-style-type: none"> On royalty for intellectual property – 15% On interest payable to non-residents on certain debt instruments – 15% On dividends – 5% 	<ul style="list-style-type: none"> Determined according to Eighth Schedule Capital gains included in a person's taxable income 	<ol style="list-style-type: none"> Fiscal stability Allowable deductions and set-offs
Namibia	<ul style="list-style-type: none"> Payable in terms of Petroleum (Taxation) Act; Income Tax Act applies to certain extent Two types of taxes: PIT and APT PIT is levied at 35%, while the rate of APT is determined using formula. 	<ul style="list-style-type: none"> On interest – 10% NRST – 10% / 25% On intellectual property – 25% Management, consultancy, entertainment and director's fees – 25% 	No CGT	<ol style="list-style-type: none"> Allowable deductions

Figure 7: Petroleum Taxes in South Africa and Namibia

Despite the fact that South Africa's income tax rates for petroleum companies are similar to other companies and thus not favouring petroleum companies, the general income tax rate is still more favourable than other countries.²²² In Angola, for example, petroleum income tax is levied at a rate of 50% under production sharing agreements and 65.75% under partnerships and risk service contracts. The income tax rate in Brazil is 34% and in Mozambique it is 32%, while in Denmark a hydrocarbon tax rate of 52% applies. In Ghana, upstream petroleum activities are taxed a corporate income tax at a rate of 50%. In Australia, the corporate income tax rate is 30%, but a resource rent tax is levied at a rate of 40%. In New Zealand, corporate income tax at a rate of

²²² Moolman (note 1) at 45.

28% applies, while a rate of 27% applies in Norway. In some countries, the income tax rates are much lower. For example, in Canada, the federal income tax rate is 15%, while in the Netherlands it is 25% (but the first €200,000 of taxable income is taxed at a rate of 20%).²²³

From the above, it is clear that for developing countries, the tax rates in South Africa and Namibia are competitive. Figure 7 above shows, however, that the South African tax regime in respect of petroleum is much more favourable than the Namibian regime. Not only are tax rates much lower, but the South African framework makes provision for the entering into of fiscal stability agreements. This protects investors against unilateral changes by the state of the tax rates. While Namibia does not have capital gains tax, its tax rates are high compared to South Africa and it does not provide sufficient investor protection. Furthermore, the new withholding tax rates are very high and may be crippling to investors, who rely on foreign services.

5. Petroleum Revenue Potential

The above discussion focuses on how petroleum revenue is created in South Africa and Namibia. However, an unwanted result of a petroleum discovery is often that the host country becomes overly dependent on the petroleum revenues, which may result in a volatile state GDP and related adverse macroeconomic effects.²²⁴ This is exacerbated by the fact that, once the resource is depleted, the revenue generated from this resources ceases.²²⁵ How governments spend the funds raised from petroleum exploitation have far-reaching effects on their political and economic well-being.²²⁶ Revenue from petroleum resources can be used in a number of ways to ensure that the public directly benefits from these resources over the long run. In Alaska, royalties, severance taxes and other petroleum-related payments make up 90% of the state's budget, which in turn enabled the state to abolish income tax and sales tax and to make an annual dividend

²²³ All figures from Ernst & Young (note 152).

²²⁴ Gilbert OT "Global Analytical Lessons for Evaluating a Myanmar Sovereign Wealth Fund" (2014) *Pacific Rim Law and Policy Journal* 579 at 581.

²²⁵ Hunter T *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis* (unpublished PhD-thesis, University of Bergen, 2010) at 64.

²²⁶ Ross (note 8) at 5.

payment to each of its residents.²²⁷ It has also been able to build the largest permanent fund in the USA, used to generate future value.²²⁸ Texas has used its petroleum revenues to establish and maintain two educational funds, one of which injects over a billion US dollar into Texas precollege education. In late 2013, the funds were valued at a combined value of approximately US\$46,5 billion.²²⁹

One way to use the revenue generated from petroleum to ensure a continued benefit for the host country is to use the revenue to fund sovereign wealth funds (“SWFs”)²³⁰ to try and curb prevent the resource curse.²³¹ A SWF is an investment fund owned or controlled by the state and consist of financial assets (such as real estate, stocks, bonds, natural resources, currencies, commodities or other financial instruments). SWFs are normally funded by foreign exchange assets or reserves, such as revenue from the sale of natural resources.²³² Some SWFs have gone so far as to invest in airports and hospitals.²³³ Kuwait established the first SWF in 1953 with the object of investing surplus oil revenues to reduce reliance on non-renewable oil reserves.²³⁴ Some, however attribute the origin of SWFs to Kiribati, a Pacific Island Nation, which established one to manage its phosphate revenues.²³⁵

The purpose of SWFs is to allow nations (especially resource-rich nations) to build up endowments to replace non-renewable resource assets.²³⁶ The International Monetary

²²⁷ McArthur JB “Stewarding Public Oil, Gas and Hard Minerals: The Express and Implied Development Rights that Protect Public Resources” (2013-2014) *Texas Journal of Oil, Gas and Energy Law* 215 at 219. It should be kept in mind, though, that Alaska only has a population of approximately three-quarters of a million.

²²⁸ McArthur (note 227) at 219 – 220.

²²⁹ McArthur (note 227) at 220 – 221.

²³⁰ Sarkar R “Sovereign Wealth Funds as a Development Tool for Asean Nations: From Social Wealth to Social Responsibility” (2009-2010) *Georgetown Journal of International Law* 621 at 622 and 623.

²³¹ Gilbert (note 224) at 581.

²³² Sarkar (note 230) at 622; Ghahramani S “Sovereign Wealth Funds, Transnational Law, and the New Paradigms of International Financial Relations” (2013) *Yale Journal of International Affairs* 52 at 54.

²³³ Ghahramani (note 232) at 52.

²³⁴ Sarkar (note 230) at 623; Ghahramani (note 232) at 52.

²³⁵ Keller A “Sovereign Wealth Fund: Trustworthy Investors or Vehicles of Strategic Ambition? An Assessment of the Benefits, Risks and Possible Regulation of Sovereign Wealth Funds” (2009) *The Georgetown Journal of Law & Public Policy* 333 at 336.

²³⁶ Keller (note 235) at 337 – 338.

Fund (“IMF”) has highlighted several distinct SWF types.²³⁷ One type, usually employed by resource-rich countries, is a stabilization fund. Its purpose is “to insulate the budget and economy from volatile commodity prices (usually oil).”²³⁸ Savings funds, on the other hand, are also employed by resource-rich countries to share wealth across generations. These funds “transfer non-renewable assets into a diversified portfolio of international financial assets to provide for future generations, or other long-term objectives.”²³⁹

Development funds allocate resources to fund vital socioeconomic projects, such as infrastructure or government pension plans.²⁴⁰ For example, Angola’s petroleum-funded *Fundo Soberano de Angola* is designed to make targeted investments in the infrastructure and hospitality industries.²⁴¹

SWFs are, however, not beyond criticism, despite its apparent benefits. For one, there is limited information available regarding SWFs, which is caused by a lack of transparency in respect of their structure, objectives and investment management.²⁴² SWFs, where they are regulated, are not required to disclose relevant information to stakeholders, such as fund performance or investment strategy.²⁴³ The lack of regulation of SWF may even give rise to corruption.²⁴⁴ The state, through various state actors, is placed in control of vast financial assets, without proper control.²⁴⁵

Namibia and South Africa do not provide for or use SWFs. It is suggested that SWFs are convenient tools to ensure that the benefit of petroleum resources is spread out over the long run, even once the petroleum resources run out.²⁴⁶ For example, when Myanmar recently discovered petroleum resources, leading international experts strongly advise the country to establish a SWF “to better manage anticipated petroleum

²³⁷ International Monetary Fund *Global Financial Stability Report: Financial Market Turbulence, Causes Consequences and Policies* (2007) at 46, available at <http://www.imf.org/External/Pubs/FT/GFSR/2007/02/pdf/text.pdf> (accessed 07.02.2015).

²³⁸ International Monetary Fund (note 237) at 46.

²³⁹ International Monetary Fund (note 237) at 46.

²⁴⁰ International Monetary Fund (note 237) at 46; Keller (note 235) at 338.

²⁴¹ Gilbert (note 224) at 593.

²⁴² Keller (note 235) at 342. See also Gilbert (note 224) at 620 -621.

²⁴³ Keller (note 235) at 342.

²⁴⁴ Keller (note 235) at 343.

²⁴⁵ Keller (note 235) at 343.

²⁴⁶ Gilbert (note 224) at 581: “...global commentators suggest that at-risk countries should deposit resource revenues into a SWF with ‘watertight governance and clear investment rules’”.

revenues and enable Myanmar to avoid problems generally associated with the ‘resource curse’²⁴⁷. However, if these two countries elect to use SWFs, proper regulation of these funds needs to be in place to ensure transparency in how these funds are constituted and managed.

6. Conclusion

A proper framework for petroleum royalty and taxation is vital for various reasons. Primarily, royalty and taxes on petroleum operations ensures that the host country benefits from the exploitation of its petroleum resources. Royalty and taxation are inevitable but the framework therefore must be attractive for investors. On a secondary level, by imposing royalty and taxes on petroleum operations, a transparent system with government accountability is promoted. The imposition of royalty and taxes also ensure accountability on the side of state. Since the royalty and taxes are imposed and collected by the state on behalf of the nation, the state does so only as agent of its people and has a duty to use the income for the benefit of the people. Where it fails to do so, the citizens can hold the state liable for failure to exercise its duties.

The framework for royalty and taxation in respect of petroleum resources in South Africa and Namibia goes to some length to attempt to balance the right of the nations to benefit from their petroleum resources with the right of the petroleum companies to enjoy a return on their investments in the host country. On the one hand, petroleum royalty is levied. In South Africa, the rate of royalty is influenced by the profitability of the petroleum company, whereas in Namibia it is not. Direct taxes are also imposed on the income generated from petroleum operations.

There are some measures in both fiscal regimes that strive to provide some protection and incentives for investors. For example, South Africa provides for the possibility of concluding a fiscal stability agreement with the Minister of Finance. This is, however, not guaranteed as it is left to the discretion of the Minister to conclude the agreement. Aside from the possibility of negotiating a fiscal stability agreement, neither South Africa nor Namibia makes any other provision for protection from changes in legislation. The only recourse a petroleum company may have, is to attempt to obtain

²⁴⁷ Gilbert (note 224) at 580 – 581.

the necessary relief in a court.²⁴⁸ While fiscal stability is desirable, the reality is that one cannot expect any fiscal regime to be set in stone – changes are inevitable.²⁴⁹

The lack of the possibility of actual stability adds to the investment risks association for petroleum resources.²⁵⁰ Other, more sound relief and incentive measures should be provided for and relied upon, such as lower tax rates, more allowable deductions and the possibility of set-offs. This is achieved in both South Africa and Namibia.²⁵¹ However, from the assessments above, it is clear that the South African regime is much more favourable to investors than the Namibian regime. Not only is income taxed at a much lower rate in South Africa, more investor relief and incentives are available in South Africa than in Namibia.

A transparent petroleum regulatory framework should disclose to the public its petroleum revenue, as is the case in Brazil, New Zealand, Norway and Alaska.²⁵² Not only will public disclosure of petroleum revenue ensure greater transparency, it will also ensure greater accountability for the state and will curb the possibility of corrupt practices. This in turn will ensure a greater benefit for the host country as a whole. Although South Africa and Namibia are not major petroleum producing countries and as a result do not have express policies regarding petroleum revenue disclosure, both countries generally have open budgets. The International Budget Partnership, which measures transparency in respect of national budgets, has in 2012 given Namibia an average rating of 55, while South Africa was rated 90, the second-highest rating after

²⁴⁸ This may be done either on the basis that the legislation is invalid or unconstitutional or that any action in terms of the legislation amounts to unfair or unjust administrative action. See Chapter Nine for the review of administrative actions.

²⁴⁹ Nakhle (note 7) at 115; Nakhle (note 8) 15.

²⁵⁰ Nakhle *C Petroleum Taxation* (2008) New York Routledge at 15.

²⁵¹ Other relief may include, for example, relief from royalties, as was done in the United States through the Deep Water Royalty Relief Act of 1995, in terms whereof companies would not have to pay royalty in respect of certain leases in the Gulf of Mexico. See Bergstrom JT “The Gift that Keeps on Giving: An Examination of the Growing Problem of Offshore Oil and Gas Royalty Relief” 2009-2010 *West Virginia Law Review* 509 at 511. This measure would, however, be premature, given the infant nature of the industries in South Africa and Namibia.

²⁵² Ross (note 8) at 59 and 60 for a discussion of countries where petroleum revenue were kept secret.

New Zealand.²⁵³ Both countries are, therefore, transparent when it comes to their budgets.²⁵⁴

Where both countries are lacking, however, is any discussion as to how petroleum revenues should be employed to ensure a continued benefit for the host country, even after the resource is depleted. In order to avoid falling victim to the resource curse, a producing country *inter alia* needs to have proper structures in place to ensure a continued benefit from the petroleum production operations.²⁵⁵ For example, in a number of countries SWFs have proven to be very successful in ensuring that the revenue generated from petroleum exploitation is used in a sustainable manner, by investing these funds in other sectors, such as infrastructure and education.

²⁵³ International Budget Partnership *Open Budget Survey* (2012) at 7, available at <http://internationalbudget.org/wp-content/uploads/OBI2012-Report-English.pdf> [accessed 11.04.2015].

²⁵⁴ Ross (note 8) at 81.

²⁵⁵ Hunter (note 225) at 70.

Chapter Eight:

SOCIO-ECONOMIC REFORM IN THE PETROLEUM INDUSTRY

1. Introduction

There is a constitutional mandate for reform in South Africa and Namibia.¹ The mandate is general, but it relates specifically too, and affects, land and natural resources. The minerals industry, especially in South Africa, has been at the forefront of reform. This is to be expected in view of this constitutional mandate and the importance of this industry for South Africa.² There are also provisions put in place to ensure that the petroleum industry is reformed as well.³ In Namibia, on the other hand, although the country's Constitution precedes the South African Constitution by six years, reform in general and in the minerals and petroleum industries in particular has been very slow.

Payment of royalty and taxes as benefits for the host nation, discussed in the previous chapter, is not the only way of ensuring benefit for the people of Namibia and South Africa. Various measures are also put in place to ensure that there is socio-economic reform in South Africa and Namibia. This includes measures aimed at achieving employment equity, ownership in companies and preferential procurement. These provisions may apply generally in these two countries, or specifically to the petroleum industry. The primary function of socio-economic reform measures is to ensure that that the people of South Africa and Namibia are empowered and benefitted in their own economies. To a certain extent, however, socio-economic reform measures also promote accountability and transparency, as discussed below.

¹ See paragraph 2 below.

² See Chapter Four above for references to past discriminatory practices in South African minerals industry. See also Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* 1 ed (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at MPRDA-9.

³ See Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at chapter 23, where the reformation of the mineral and petroleum industry is discussed in detail.

2. The Constitutional Mandate for Reform

One of the primary intentions of effects of the apartheid regime in South Africa was to prevent black economic empowerment.⁴ The South African Constitution responds hereto by aiming to redress past discriminatory practices.⁵ This is evident from the Preamble to the South African Constitution, which states that the people of South Africa recognise the injustices of their past.⁶ The Preamble further confirms that the Constitution of South Africa is adopted as the supreme law of South Africa to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”⁷

The South African Constitution states that the Republic of South Africa is a sovereign, democratic state founded on various values, including human dignity, the achievement of equality and the advancement of human rights and freedoms.⁸ To achieve equality, the South African Constitution provides that all persons are equal before the law and entitled to equal protection and benefit of the law.⁹ Neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹⁰ Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.¹¹ The reference to “legislative and other measures” in the South African

⁴ Benjamin P, Raditapole T and Taylor M *Black Economic Empowerment: Commentary, Legislation & Charters* (2005, Revision Service 8 2014) Claremont Juta & Co Ltd at 1-3.

⁵ Benjamin, Raditapole and Taylor (note 4) at 1-4.

⁶ See the Preamble to the South African Constitution.

⁷ See the Preamble to the South African Constitution.

⁸ Section 1(a) of the South African Constitution.

⁹ Section 9(1) of the South African Constitution. In the light of this section of the Constitution, remedial measures must be used as a means to achieve equality, not as an exception to the principle of equality. See Benjamin, Raditapole and Taylor (note 4) at 1-4.

¹⁰ Section 19(3) and section 19(4) of the South African Constitution.

¹¹ Section 9(2) of the South African Constitution.

Constitution is where the “thrust of transformative legislation” in South Africa is rooted.¹²

The Preamble to the Namibian Constitution recognises the fundamental rights of all persons and also recognises that these rights have for long been denied to the people of Namibia through colonialism, racism and apartheid. The Namibian Constitution is centred on redressing past wrongs and pursuing fundamental rights such as equality and fraternity.¹³ As a result, the Namibian Bill of Rights entrenches the right of equality by providing that all persons are equal before the law.¹⁴ No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.¹⁵

The Namibian Bill of Rights also directly addresses the issue of apartheid and affirmative action. The Namibian Constitution prohibits the practice and ideology of apartheid and provides that the propagation of apartheid practices may be rendered criminally punishable.¹⁶ The entrenchment of the right to equality does not prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.¹⁷ When enacting this legislation, Parliament may have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.¹⁸

¹² Balshaw T and Goldberg D *Broad-based Black Economic Empowerment: Amended Codes and Scorecards* (2014) Cape Town Tafelberg at 69.

¹³ See the Preamble to the Namibian Constitution.

¹⁴ Article 10(1) of the Namibian Constitution.

¹⁵ Article 10(2) of the Namibian Constitution.

¹⁶ Article 23(1) of the Namibian Constitution.

¹⁷ Article 23(2) of the Namibian Constitution.

¹⁸ Article 23(3) of the Namibian Constitution.

Aside from the entrenched right to equality, the Constitution also states that it is a principle of state policy that the state actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society.¹⁹ In particular, the government must ensure the implementation of the principle of non-discrimination in remuneration of men and women.²⁰ The problem, however, is that principles of state policy are not justiciable, which makes them less effective than say, for example, the provisions contained in the Bill of Rights.

By constitutionalising the mandate of the state to promote transformation, the instructions by the state are clear. This promotes transparency with regard to socio-economic reform measures in general and in respect of petroleum. It is further clear what the duties of the state are and the state may be held accountable should it fail to exercise these duties.

3. The Broad Empowerment Framework

In the light of the constitutional guarantee of equality, the South African legislature has imposed various measures to promote equality and redressing past discriminatory practices. To this effect, legislation dealing specifically with broad-based black economic empowerment framework has been adopted. This legislation applies in general in South Africa and not only to the petroleum industry. However, the MPRD Act specifically includes objects relating to socio-economic empowerment, as the following discussion shows.

Despite the fact that the Namibian Constitution acknowledges the past discriminatory practices, very few steps have been taking in respect of redressing historical wrongs in Namibia. In fact, shortly after Independence legislation was passed promoting foreign investment in Namibia.²¹ The Foreign Investment Act states that a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake.²² It specifically provides that no foreign national engaged in a business

¹⁹ Article 95(1)(a) of the Namibian Constitution.

²⁰ Article 95(1)(a) of the Namibian Constitution.

²¹ Foreign Investment Act 27 of 1990.

²² Section 3(1) of the Foreign Investment Act.

activity or intending to commence a business activity in Namibia shall be required to provide for Namibian participation (either by the Namibian Government or a Namibian citizen) as shareholder or as partner in such business. Similarly, no foreign national shall be required to provide for the transfer of such business to the Government or any Namibian.²³ There is, however, an exception: it may be a condition of any licence for natural resources (including) petroleum that *the Government* must be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights granted in terms of the licence.²⁴ It is clear from this section that the Act only envisages *Government* to hold an interest in the licence, not *Namibian citizens*.

Notwithstanding the above and unlike South Africa, Namibia does not have general legislation dealing with black economic empowerment. A transformation document called the *The New Equitable Economic Empowerment Framework* has been published, but is not binding. Steps have, however, been taken to ensuring equity within the workplace through affirmative action measures.²⁵ Furthermore, the legislation dealing with petroleum contains certain measures towards achieving socio-economic empowerment.²⁶

3.1 South Africa

At the heart of the initiative of the South African government to transform the manner in which the country's economy operates is the notion of broad-based economic empowerment, or BEE in short.²⁷ BEE is "a government initiative to promote economic transformation ... to enable meaningful participation in the economy by black people".²⁸

South Africa's broad-based black economic empowerment initiative commenced with a strategy document entitled *South Africa's Economic Transformation: A Strategy for*

²³ Section 3(3) of the Foreign Investment Act.

²⁴ Section 3(3) of the Foreign Investment Act.

²⁵ The Affirmative Action (Employment) Act 29 of 1998.

²⁶ See 4.2. below.

²⁷ Southall R "The ANC and Black Capitalism in South Africa" 2004 (31) *Review of African Political Economy* 313 at 315.

²⁸ Balshaw and Goldberg (note 12) at 13.

Broad-Based Black Economic Empowerment (“**Empowerment Strategy**”),²⁹ followed by framework legislation dealing with black economic empower, the Broad-Based Black Economic Empowerment Act (“**BEE Act**”).³⁰ The BEE Act is further supplemented by the BEE Code and a Scorecard. Each one of these is now discussed in more detail.³¹

3.1.1 The Empowerment Strategy

The Empowerment Strategy recognises that a response from government is required in the light of “the systemic dispossession and disempowerment of black people that defined South Africa”.³² South Africa needed a focused BEE strategy to achieve the broad-based economic empowerment of black persons to facilitate growth, development and stability in the South African economy.³³

“Black persons”, in terms of the Empowerment Strategy, is a generic term which means indigenous South Africans, coloureds and Indians.³⁴ The Empowerment Strategy defines BEE as “an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country’s economy, as well as significant decreases in income inequalities”.³⁵

The BEE process includes elements of human resource development, employment equity, enterprise development, preferential procurement as well as investment, ownership and control of enterprises and economic assets.³⁶ The successful implementation of the BEE strategy will be evaluated against various policy objectives..³⁷

²⁹ Department of Trade and Industry “*South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment*” available at https://www.thedti.gov.za/economic_empowerment/bee-strategy.pdf [accessed 02.02.2014].

³⁰ Broad-Based Black Economic Empowerment Act 53 of 2003.

³¹ See in general Balshaw and Goldberg (note 12) at 70.

³² Empowerment Strategy, par 2.7.1. See also Benjamin, Raditapole and Taylor (note 4) at 1-3.

³³ Empowerment Strategy, par 3.1.1.

³⁴ Empowerment Strategy, par 3.1.1.

³⁵ Empowerment Strategy, par 3.2.2.

³⁶ Empowerment Strategy, par 3.2.3.

³⁷ Empowerment Strategy, par 3.3.

- (i) There must be a substantial increase in the number of black people who have ownership and control of existing and new enterprises.
- (ii) There must be a substantial increase in the number of black people who have ownership and control of existing and new enterprises in the priority sectors of the economy that government has identified in its microeconomic reform strategy.³⁸
- (iii) There must be a significant increase in the number of new black enterprises, black-empowered enterprises and black-engendered enterprises.³⁹
- (iv) There must be a significant increase in number of black people in executive and senior management of enterprises.⁴⁰
- (v) The proportion of the ownership and management of economic activities vested in community and broad-based enterprises and co-operatives must increase.⁴¹
- (vi) Ownership of land and other productive assets must increase, access to infrastructure must be improved, acquisition of skills must be increased, as must participation in productive economic activities in under-developed areas.⁴²
- (vii) An accelerated and shared economic growth is also expected.⁴³
- (viii) Income levels of black persons must increase and income inequalities between and within race groups must decrease.⁴⁴

The Empowerment Strategy sets out various policy instruments to achieve BEE. Government will utilise these policy instruments to achieve its objectives in respect of BEE.⁴⁵ The policy instruments include legislation and regulation dealing with broad-based black economic empowerment.⁴⁶ In terms of the Empowerment Strategy, the government will use a “balanced scorecard” to measure progress made in achieving

³⁸ Empowerment Strategy, par 3.3.

³⁹ Empowerment Strategy, par 3.3.

⁴⁰ Empowerment Strategy, par 3.3.

⁴¹ Empowerment Strategy, par 3.3.

⁴² Empowerment Strategy, par 3.3.

⁴³ Empowerment Strategy, par 3.3.

⁴⁴ Empowerment Strategy, par 3.3.

⁴⁵ Empowerment Strategy, par 3.5.1.

⁴⁶ Empowerment Strategy, par 3.5.2. and par 3.5.3.

BEE by enterprises and sectors.⁴⁷ The scorecard will measure three core elements of BEE, namely direct empowerment through ownership and control⁴⁸ of enterprises and assets, human resource development and employment equity and indirect empowerment through preferential procurement and enterprise development.⁴⁹

The Empowerment Strategy recognises the policy instrument of preferential procurement as an effective instrument to promote BEE in the South African economy.⁵⁰ Enabling legislation must provide that all government departments, state-owned enterprises and public agencies must take into account any code of practice issues in terms of the legislation in determining and implementing their preferential procurement policy.⁵¹

Another policy instrument is institutional support and a BEE Advisory Council.⁵² Government must establish a BEE Advisory Council to advise on the implementation of the BEE strategy.⁵³ This Council must advise the President on BEE and review progress in achieving BEE.⁵⁴ The Council must also provide advice on new programmes and instruments to achieve the agreed objectives, promote partnerships to enhance the implementation of BEE, advise on sector and enterprise charters and advise on codes of practice and guidelines.⁵⁵

In the Empowerment Strategy, government recognises that its BEE strategy will not be effective if government acts alone without the support of the private sector. As such, partnerships between government and the private sector represent a key vehicle for the formulation and implementation of BEE programmes at different levels and in different sectors of the economy.⁵⁶ One such form that partnership can take is sector- and

⁴⁷ Empowerment Strategy, par 3.5.3.1.

⁴⁸ Control means: (a) the right or the ability to direct or otherwise control the majority of the votes attaching to the shareholder's issued shares; (b) the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors of that shareholder; and (c) the right to control the management of that shareholder. See the Empowerment Strategy, App A under the heading *Core Components of BEE*.

⁴⁹ Empowerment Strategy, par 3.5.3.1.

⁵⁰ Empowerment Strategy, par 3.5.5.

⁵¹ Empowerment Strategy, par 3.5.5.

⁵² Empowerment Strategy, par 3.5.6.

⁵³ Empowerment Strategy, par 3.5.6.2.

⁵⁴ Empowerment Strategy, par 3.5.6.2.

⁵⁵ Empowerment Strategy, par 3.5.6.2.

⁵⁶ Empowerment Strategy, par 3.5.7.2.

enterprise-based charters.⁵⁷ Government must issue a code of good practice outlining in detail the core elements that should be incorporated into sector- and enterprise-based charters.⁵⁸

The Empowerment Strategy proposed the promulgation of legislation and the use of a balanced scorecard as a code of good practice under the legislation to determine progress in the achievement of BEE goals by various industry sectors and enterprises.⁵⁹ It was the first document to make reference to a scorecard and identified the various elements to BEE.⁶⁰ The Empowerment Strategy gained legislative recognition in the BEE Act.⁶¹

3.1.2 Framework Legislation

The BEE Act sets out the framework legislation for the government's BEE initiative.⁶² It follows in the wake of the Empowerment Strategy.⁶³ The primary objective of the BEE Act is to facilitate broad-based black economic empowerment.⁶⁴ In terms of the BEE Act, broad-based black economic empowerment means the economic empowerment of all black people (Africans, coloureds and Indians) including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies.⁶⁵ These strategies include, but are not limited

⁵⁷ Empowerment Strategy, par 3.5.7.4.

⁵⁸ Empowerment Strategy, par 3.5.7.8.

⁵⁹ Empowerment Strategy, par 3.5. See also Badenhorst and Mostert (note 3) at 23-2.

⁶⁰ Kleynhans EPJ and Kruger MC "Effect of Black Economic Empowerment on Profit and Competitiveness of Firms in South Africa" (2014) *Acta Commercii* 1 at 2.

⁶¹ Section 11 of the BEE ACT.

⁶² Benjamin, Raditapole and Taylor (note 4) at 1-3.

⁶³ Badenhorst and Mostert (note 3) at 23-4.

⁶⁴ This is to be achieved by: (a) promoting economic transformation to enable meaningful participation of black people in the economy; (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises; (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; (d) increasing the extent to which black women own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training; (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people to achieve sustainable development and general prosperity; (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and (g) promoting access to finance for black economic empowerment. See section 2 of the BEE ACT.

⁶⁵ See section 1 of the BEE ACT, *sv* "broad-based black economic empowerment". The rationale for referring to "broad-based black economic empower" rather than just to "black economic empowerment" is to emphasise that empowerment is not only for an elite few, but for all black persons. See Benjamin, Raditapole and Taylor (note 4) at 1-6.

to, increasing the number of black people that manage, own and control enterprises and productive assets, facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises and human resource and skills development.⁶⁶ The strategies also include, but are not limited to, achieving equitable representation in all occupational categories and levels in the workplace, preferential procurement and investment in enterprises that are owned or managed by black people.⁶⁷

As provided for in the Empowerment Strategy, the BEE Act provides for the establishment of the Black Economic Empowerment Advisory Council.⁶⁸ It also provides for the composition, constitution and rules of the Council as well as remuneration and reimbursement of expenses incurred by Council members.⁶⁹ The Act also sets out the functions of the Council.⁷⁰ The Council must advise government on BEE and review progress in achieving BEE.⁷¹ The Council must further advise of drafts codes of good conduct and on the development, amendment or replacement of the Empowerment Strategy.⁷² If requested to do so, the Council must advise on draft transformation charters and facilitate partnerships between organs of state and the private sector that will advance the objectives of the BEE Act.⁷³

The BEE Act specifically makes provision for codes of good practice, as envisaged in the Empowerment Strategy.⁷⁴ The Minister of Trade and Industry may, to promote the purposes of the BEE Act, issue codes of good practice on BEE.⁷⁵ The codes “underpin a regime designed to redress the wrongs suffered by Black people during the apartheid

⁶⁶ See section 1 of the BEE ACT, *sv* “broad-based black economic empowerment”.

⁶⁷ See section 1 of the BEE ACT, *sv* “broad-based black economic empowerment”.

⁶⁸ Section 4 of the BEE ACT.

⁶⁹ Section 6, 7 and 8 of BEE ACT.

⁷⁰ Section 5 of the BEE ACT.

⁷¹ Section 5(a) and (b) of the BEE ACT.

⁷² Section 5(b) and (c) of the BEE ACT.

⁷³ Section 5(e) and (f) of the BEE Act.

⁷⁴ Section 9 of the BEE Act.

⁷⁵ Section 9(1) of the BEE Act. The codes may include the further interpretation and definition of broad-based BEE and the interpretation of definition of different categories of black empowerment entities. It may also include qualification criteria for preferential purposes for procurement and other economic activities as well as indicators to measure broad-based BEE. The codes of good practices may further include the weighting to be attached to broad-based BEE indicators and guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sectors. Finally, they may include any other matter necessary to achieve the objectives of the BEE Act.

years.”⁷⁶ The codes revolve around scorecards, which are used to measure BEE compliance by using defined elements, namely ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development and sector-specific contributions.⁷⁷

When preparing a code of good practice, the Empowerment Strategy must be taken into account.⁷⁸ A code of good practice may specify targets consistent with the objectives of the BEE Act and the period within which those targets must be achieved.⁷⁹ To promote the achievement of equality of women, a code of good practice may distinguish between black men and black women.⁸⁰ A code issued by the Minister must be taken into account by every organ of state and public entity.⁸¹ Organs of state and public entities must take the codes into account when determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law.⁸² This is particularly relevant for the petroleum industry. The BEE Act effectively obliges the Minister of Mineral Resources to take the codes of good practice into account when granting and issuing rights in respect of petroleum. Organs of state and public entities must also take the codes into account when developing and implementing preferential procurement policies, determining qualification criteria for the sale of state-owned enterprises and developing criteria for entering into partnerships with the private sector.⁸³

Aside from the codes of good practice, the Minister must publish and promote a transformation charter for a particular sector of the economy.⁸⁴ The Minister must only publish the transformation charters if the Minister is satisfied that the charter has been developed by major stakeholders in that sector and advances the objectives of the BEE Act.⁸⁵ A Charter therefore represents a collaborative effort of stakeholders within a

⁷⁶ Scholtz W and Van Wyk C *BEE Service Empowerment* (2005, Issue 12 2013) Durban LexisNexis at 1-1.

⁷⁷ Scholtz and Van Wyk (note 76) at 1-1.

⁷⁸ Section 9(2) of the BEE Act.

⁷⁹ Section 9(3) of the BEE Act.

⁸⁰ Section 9(4) of the BEE Act.

⁸¹ Section 10 of the BEE Act.

⁸² Section 10(a) of the BEE Act.

⁸³ Section 10(b) to (c) of the BEE Act.

⁸⁴ Section 12 of the BEE Act.

⁸⁵ Section 12 of the BEE Act.

particular industry, rather than an instrument imposed by the state.⁸⁶ To this effect, a *Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry* was published for the petroleum industry. This Charter is discussed below.⁸⁷

3.1.3 The BEE Code and Scorecard

The BEE Act is accompanied by a Code of Good Practice, the latest version of which was published in 2013 (“**Code**”).⁸⁸ This Code applies to all organs of state and public entities.⁸⁹ It is therefore applicable to the Minister of Mineral Resources, who must take this Code into account when granting rights in respect of petroleum. The Code also applies to all Measured Entities⁹⁰ that undertake any economic activity with all organs of state and public entities, as well as any other Measured Entity that undertakes any economic activity (direct or indirect) with any other Measures Entity that is subject to measurement under the Code.⁹¹

The Code contains a broad-based BEE generic scorecard (“**Scorecard**”).⁹² One of the key principles of the Code is that, when measuring BEE compliance, substance takes precedence over legal form.⁹³ Furthermore, misrepresentation of a company’s BEE status may lead to a disqualification of the entire scorecard.⁹⁴

Micro-enterprises, meaning enterprises with a total revenue⁹⁵ of less than R10 million, are Exempt Micro-Enterprises.⁹⁶ This effectively means that, upon proof of revenue, they are exempt from the BEE regime and is accorded an automatic Level 4 status.⁹⁷ A Level 4 status means the entity is considered to have a BEE recognition level of

⁸⁶ Benjamin, Raditapole and Taylor (note 4) at 1-12.

⁸⁷ See paragraph 3.3. below.

⁸⁸ Government Notice 1019 of *Government Gazette* 36928 of 11 October 2013 (“**Code**”).

⁸⁹ Code, Statement 000, par 3.1.1.

⁹⁰ A “Measured Entity” means an entity (including organ of state or public entity) subject to measurement under the Code and in respect of which a sector code has been issued in terms of the BEE Act. See See Schedule 1 to the Code and Code, Statement 000, par 3.2.3.

⁹¹ Code, Statement 000, par 3.1.2. and par 3.1.3.

⁹² Code, Statement 000, par 8.

⁹³ Code, Statement 000, par 2.1.

⁹⁴ Code, Statement 000, par 2.4.

⁹⁵ “Total Revenue” means the total income of an entity from its operations as determined under South African Generally Accepted Accounting Practices. See Schedule 1 to the Code.

⁹⁶ Code, Statement 000, par 4.1.

⁹⁷ Code, Statement 000, par 4.2; Scholtz and Van Wyk (note 76) at 1-3.

100%.⁹⁸ If the Exempt Micro-Enterprise is wholly black-owned, it qualifies for an elevation to Level 1 status, meaning it will have a BEE recognition level of 135%.⁹⁹ If the Exempt Micro-Enterprise is at least 51% black-owned, it qualifies for an elevation to Level 2 status, which means it will have a BEE recognition level of 125%.¹⁰⁰

Measured entities with a total revenue of between R10 million and R50 million qualify as Qualifying Small Enterprises.¹⁰¹ These entities must comply with all of the elements of BEE for the purpose of measurement,¹⁰² but is measured against a different scorecard. A Qualifying Small Enterprise which is wholly black-owned qualifies for a Level 1 status, while a Qualifying Small Enterprise which is at least 51% black-owned qualifies for a Level 2 status.¹⁰³

Start-up enterprises, regardless of the expected turnover, must be measured as an Exempt Micro-Enterprise for the first year after its incorporation.¹⁰⁴ If, however, it tenders for a contract with a value of higher than R10 million but less than R50 million, it must use the Qualifying Small Enterprise scorecard.¹⁰⁵ If the value of the contract exceeds R50 million, it must use the generic scorecard to measure its compliance.¹⁰⁶ Importantly for start-up enterprises in the petroleum industry, is that the same provisions that apply to tendering for contracts must also be applied where the Minister of Mineral Resources determines qualification criteria for the issuing of rights to petroleum.¹⁰⁷ The preferential treatment given to start-up enterprises therefore does not apply to start-up enterprises who apply for rights to petroleum.

In terms of the Scorecard, empowerment rests on five pillars: ownership, management control, skills development, enterprise and supplier development and socio-economic development.¹⁰⁸ Each pillar carries a specific weighting. Ownership contributes 25 points, management control 15 points, skills development 20 points, enterprise and

⁹⁸ Code, Statement 000, par 8.2.1.

⁹⁹ Code, Statement 000, par 4.3.1. and par 8.2.1.

¹⁰⁰ Code, Statement 000, par 4.3.2. and par 8.2.1.

¹⁰¹ Code, Statement 000, par 5.1.

¹⁰² Code, Statement 000, par 5.2.

¹⁰³ Code, Statement 000, par 5.3.

¹⁰⁴ Code, Statement 000, par 6.1.

¹⁰⁵ Code, Statement 000, par 6.3.

¹⁰⁶ Code, Statement 000, par 6.3.

¹⁰⁷ Code, Statement 000, par 6.4 read with section 10(a) of the BEE Act.

¹⁰⁸ Code, Statement 000, par 8.

skills development 40 points and socio-economic development 5 points.¹⁰⁹ A Measured Entity requires 100 points to be fully compliant. Since the different pillars add up to 105 points, it is possible to be fully compliant without meeting all the criteria.

In terms of the pillar of ownership, an entity receives points for participation by black people in its rights of ownership.¹¹⁰ Ownership is measured using the ownership scorecard.¹¹¹ Black people may hold their rights of ownership in a Measured Entity as direct participants or as participants through some other form as entity, such as a company, close corporation, co-operative, trust, employee share ownership programme or partnership.¹¹²

As with the ownership pillar, the management control pillar of empowerment uses a management control scorecard to measure the criteria used for deriving a score for management control.¹¹³ The management control pillar envisages participation on board level, other executive management, senior management, middle management, junior management and employees with disabilities.¹¹⁴ A Measured Entity receives point by meeting the targets for participation of black people and black women at each level.¹¹⁵

In terms of the pillar of skills development, compliance with this pillar is measured by using the skills development scorecard.¹¹⁶ This scorecard sets out various categories of compliance targets.¹¹⁷ These compliance targets are based on the overall demographic representation of black people.¹¹⁸ When determining a Measured Entity's score, the targets should be further broken down into specific criteria according to the different race sub-groups.¹¹⁹

¹⁰⁹ Code, Statement 000, par 8.

¹¹⁰ Code, Statement 100, par 3.1.1.

¹¹¹ Code, Statement 100, par 3.1.1.

¹¹² Code, Statement 100, par 3.1.1.

¹¹³ Code, Statement 200, par 2.

¹¹⁴ Code, Statement 200, par 2.

¹¹⁵ Code, Statement 200, par 3.1.

¹¹⁶ Code, Statement 300, par 2.1.

¹¹⁷ Code, Statement 300, par 2.1.

¹¹⁸ Code, Statement 300, par 2.2.

¹¹⁹ Code, Statement 300, par 2.3.

The enterprise and supplier development pillar consists of preferential procurement and enterprise development and supplier development.¹²⁰ The enterprise and supplier development scorecard sets out the criteria for deriving a score for the enterprise and supplier development pillar.¹²¹

With regard to the socio-economic development pillar, Measured Entities receive recognition for any socio-economic development contributions that are quantifiable as a monetary value.¹²² The criteria and method for deriving a score for the socio-economic development pillar is set out in the socio-economic development scorecard.¹²³

3.2 Namibia

In 2011, Cabinet adopted the New Equitable Economic Empowerment Framework (“NEEEF”).¹²⁴ The NEEEF was drafted in accordance with the Constitutional right to equality and the principle of state policy aimed at equality.¹²⁵ The aim of the NEEEF is to provide a clear, overarching policy framework into which all other policies for transformation will slot.¹²⁶ The idea is that the NEEEF will be in place for a period of twenty-five years from 2011 to 2036 and the eventual success of the NEEEF in achieving its goals will mean that beyond 2036, no such framework will be necessary.¹²⁷

The NEEEF is designed to be an incentive-driven set of policies that encourage businesses to take transformation more seriously as opposed to a penalty-driven

¹²⁰ Code, Statement 400, par 3.1.1. and 3.1.2.

¹²¹ Code, Statement 400, par 2.

¹²² Code, Statement 500, par 3.1.1.

¹²³ Code, Statement 500, par 2.3.

¹²⁴ Available at Government of the Republic of Namibia “The New Equitable Economic Empowerment Framework” available at http://209.88.21.36/opencms/export/sites/default/grnnet/OPMv2/DocArchive/StatutesBills/NEEEF_final.pdf [accessed 02.02.2014]. See also Stritter A “Namibia” in Richer la Flèche E (ed) *The Mining Law Review* 3ed (2014) London Law Business Research Ltd at 204.

¹²⁵ Article 23(2) and article 95(1)(a) of the Article 95(1)(a) of the Constitution of the Republic of Namibia of 1990.

¹²⁶ NEEEF, under the heading *Rational*.

¹²⁷ NEEEF, under the heading *Sunset Clause*.

initiative.¹²⁸ Non-compliant companies will not be penalised, but will not be eligible to tender for government tenders or to receive fishing, telecoms or other licences.¹²⁹

As with the South African BEE framework, the NEEEF envisages sector-specific charters.¹³⁰ The sector-specific charters will deal with the broader issues within the empowerment framework.¹³¹ Charters may not change the targets and weightings of the NEEEF, but will only complement the overall objectives of the NEEEF by addressing specific indicators that should be adopted within the various sectors within the given guidelines.¹³²

As with South Africa, the objectives of the NEEEF are very wide. In Namibia, however the objectives stated in NEEEF are not a closed list. The primary purpose of NEEEF is, however, socio-economic development.¹³³

In terms of the NEEEF, government will establish a Commission for New Equitable Economic Empowerment Framework (“**NEEEF Commission**”) to promote and administer the NEEEF.¹³⁴ The NEEEF Commission is to be made up of representatives of government, business, trade unions and other organisations.¹³⁵ The NEEEF Commission must be established as a key mechanism of providing guidance and overall monitoring on the state of transformation and empowerment in the entire economy.¹³⁶ The NEEEF provides for the composition of the NEEEF Commission.¹³⁷ It also

¹²⁸ NEEEF, under the heading *Compliance, Enforcement and Penalties*.

¹²⁹ NEEEF, under the heading *Compliance, Enforcement and Penalties*.

¹³⁰ NEEEF, under the heading *Sector Specific Charters*.

¹³¹ NEEEF, under the heading *Sector Specific Charters*.

¹³² NEEEF, under the heading *Sector Specific Charters*.

¹³³ NEEEF, under the heading *Objectives*. They include: (a) ensuring the sharing of Namibian resources in an equitable and sustainable basis by the people of Namibia; (b) creating a socially just society; (c) implementation of measurable policies of redress and redistribution; (d) creating vehicles for empowerment; (e) removing barriers of socio-economic advancement to enable previously disadvantaged persons to access productive assets and opportunities for empowerment; (f) actively guarding against the repugnant tendencies of window-dressing, favouritism, nepotism and self-enrichment; (g) providing measurement of empowerment targets; and (h) ensuring that an empowering act is meant to launch individuals to empower themselves in the future using the basis of their initial empowerment.

¹³⁴ NEEEF, under the heading *Commission for Equitable Economic Empowerment Framework*.

¹³⁵ NEEEF, under the heading *Commission for Equitable Economic Empowerment Framework*.

¹³⁶ NEEEF, under the heading *Commission for Equitable Economic Empowerment Framework*.

¹³⁷ NEEEF, under the heading *Composition*.

provides for the functions and powers of the NEEEF Commission.¹³⁸ With regard to the powers of the NEEEF Commission, it will have all the powers necessary to enable it to fulfil its functions.¹³⁹

The NEEEF, as with the South African BEE legislative framework, uses a scorecard to measure compliance.¹⁴⁰ The NEEEF intends to promote transformation in business through five empowerment pillars.¹⁴¹ The scorecard measures each empowerment pillar. Businesses that need to comply with the NEEEF will be expected to provide audited proof that they have achieved the NEEEF targets.¹⁴² The pillars are ownership, management control and employment equity, human resources and skills development, entrepreneurship development and community investment.

With regard to ownership, the NEEEF aims to promote more equitable and balanced ownership of business in Namibia, while at the same time recognising the Constitutional protection of private property and the promotion of foreign investment.¹⁴³ The NEEEF envisages the transformation of corporate ownership in the economy to be steadily changed through a two-pronged approach. First, assistance will be provided to previously disadvantaged Namibians to buy into existing businesses on commercial or near-commercial terms.¹⁴⁴ Second, assistance will be provided to enable

¹³⁸ NEEEF, under the headings *Functions of the Commission* and *Powers of the Commission*. The functions of the NEEEF are: (a) reporting to government on the NEEEF; reviewing progress in achieving the NEEEF; (c) advising on principles of good governance and good practice; (d) advising on the development, amendment or replacement of the strategy; (e) advising on draft transformation charters if requested to do so; (f) facilitating partnerships between organs of state and the private sector that will advance the objectives of the NEEEF; (g) overseeing the implementation of the NEEEF; (h) ensuring that there is consistency in the implementation of the NEEEF; (i) providing direction to the executive resource over the life of the NEEEF; (j) taking decisions affecting the NEEEF and its implementation; (k) deciding on how funds for the Commission will be raised; (l) reporting on the state of transformation and empowerment in the economy; and (m) maintaining a database of transformation and empowerment in the economy and enablers and obstacles of implementing the NEEEF.

¹³⁹ NEEEF, under the heading *Powers of the Commission*. These powers include: (a) conducting research or commissioning research to be conducted; (b) requesting information from organs of state or private bodies; (c) publishing reports of the NEEEF; (d) establishing sub-committees to deal with specific matters as and when required; (e) co-opting experts to serve on, or advise, sub-committees; (f) establishing relations and seeking cooperation from the various sector charter councils; and (g) carrying out accredited functions.

¹⁴⁰ NEEEF, under the heading *Summarised NEEEF Scorecard*.

¹⁴¹ NEEEF, under the heading *Rational*.

¹⁴² NEEEF, under the heading *Compliance, Enforcement and Penalties*.

¹⁴³ NEEEF, under the heading *(a) Ownership*.

¹⁴⁴ NEEEF, under the heading *(a) Ownership*.

previously disadvantaged Namibians to establish new businesses.¹⁴⁵ In addition to the above, Namibia's foreign investment legislation must clarify the role that foreign investment will play in the economy and provide guidelines for foreign investors with the aim to enhance certainty and investor confidence.¹⁴⁶ Previously disadvantaged Namibians must be given financial and other assistance through state-owned financial institutions to buy into existing Namibian businesses on commercial terms to be negotiated between buyers and sellers.¹⁴⁷ Special assistance must be given to assisting women, youth and people with disabilities.¹⁴⁸ New business growth financed by state-owned financial institutions must prioritise the promotion of businesses owned by previously disadvantaged Namibians.¹⁴⁹ Again, special emphasis must be given to assisting women, youth and people with disabilities.¹⁵⁰ In sectors where previously disadvantaged Namibian individuals do not have the resources to participate in a meaningful way, the Namibian government may choose to participate as a transformation partner.¹⁵¹ This must, however, take place on commercial terms and must be clearly laid out in legislation.¹⁵² A business will score a minimum of ten points if it is 25% owned by previously disadvantaged Namibians.¹⁵³ For every additional 7½% owned by previously disadvantaged Namibians, a business will score one additional point up to a maximum of 100%, giving a total of twenty points.¹⁵⁴

The NEEEF aims that the management structures and workforces of businesses in Namibia should more accurately reflect the demographics of the Namibian population.¹⁵⁵ Legislation must be introduced within the NEEEF framework (but on a sector by sector basis) to require boards of directors and top management in certain categories of companies above a certain size to reflect fully Namibia's demographic make-up.¹⁵⁶ These requirements must take into account the shareholding structure of

¹⁴⁵ NEEEF, under the heading (a) *Ownership*.

¹⁴⁶ NEEEF, under the heading (a) *Ownership*.

¹⁴⁷ NEEEF, under the heading (a) *Ownership*.

¹⁴⁸ NEEEF, under the heading (a) *Ownership*.

¹⁴⁹ NEEEF, under the heading (a) *Ownership*.

¹⁵⁰ NEEEF, under the heading (a) *Ownership*.

¹⁵¹ NEEEF, under the heading (a) *Ownership*.

¹⁵² NEEEF, under the heading (a) *Ownership*.

¹⁵³ NEEEF, under the heading (a) *Ownership*.

¹⁵⁴ NEEEF, under the heading (a) *Ownership*.

¹⁵⁵ NEEEF, under the heading (b) *Management Control and Employment Equity*.

¹⁵⁶ NEEEF, under the heading (b) *Management Control and Employment Equity*.

the company.¹⁵⁷ A business will score a minimum of ten points if its combined board and top management structures are 50% filled by previously disadvantaged Namibians.¹⁵⁸ For every additional 10%, a business will score two additional points up to a maximum of 100%, giving a total of 20%.¹⁵⁹

Practical training and skills development are key to empowerment and transformation in the business sector.¹⁶⁰ Encouraging Namibian businesses to play a greater role in training and skills development is one of the most effective ways of promoting human capital formation in the country as a whole.¹⁶¹ The NEEEF envisages a training levy to be introduced by the National Training Authority.¹⁶² The levy will amount to 1.5% of a company's gross wage bill and will be payable by companies above a certain size.¹⁶³ A business will score a minimum of ten points for devoting the equivalent of 1.5% of its gross wages to training.¹⁶⁴ For every additional 0.1% of gross wages spent on training, a business will score two additional points up to a maximum of 2% of gross wages, giving a total of twenty points.¹⁶⁵

The NEEEF aims at enhancing entrepreneurship among previously disadvantaged Namibians.¹⁶⁶ Business opportunities created by existing Namibian businesses through their procurement programmes represent an important area for stimulating local entrepreneurship.¹⁶⁷ A business will score points in proportion to the value of its procurement spending allocated to businesses owned by previously disadvantaged Namibians up to a maximum of 50%.¹⁶⁸ Additional points may be made available for other support given by businesses to previously disadvantaged Namibians, including mentorship programmes, joint ventures and other initiatives.¹⁶⁹

¹⁵⁷ NEEEF, under the heading *(b) Management Control and Employment Equity*.

¹⁵⁸ NEEEF, under the heading *(b) Management Control and Employment Equity*.

¹⁵⁹ NEEEF, under the heading *(b) Management Control and Employment Equity*.

¹⁶⁰ NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶¹ NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶² NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶³ NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶⁴ NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶⁵ NEEEF, under the heading *(c) Human Resources and Skills Development*.

¹⁶⁶ NEEEF, under the heading *(d) Entrepreneurship Development*.

¹⁶⁷ NEEEF, under the heading *(d) Entrepreneurship Development*.

¹⁶⁸ NEEEF, under the heading *(d) Entrepreneurship Development*.

¹⁶⁹ NEEEF, under the heading *(d) Entrepreneurship Development*.

The NEEEF believes corporate social responsibility has become part and parcel of the modern business environment.¹⁷⁰ Good corporate citizenship requires social investment in communities.¹⁷¹ This is particularly important for businesses that derive their income from communities or community resources.¹⁷² The NEEEF will require businesses above a certain size to devote at least 1% of after-tax profits to community investment.¹⁷³ A business will score a minimum of ten points for devoting 1% of after-tax profits to community investment.¹⁷⁴ For every additional 0.2% spent on community investment, a business will score two additional points up to a maximum of 2% of after-tax profits, giving a total of twenty points.¹⁷⁵

The NEEEF, unlike the BEE Act, is a policy document.¹⁷⁶ It is therefore not binding. Because it is not binding, there are no measures of ensuring accountability in respect of the NEEEF. It is also applied inconsistently in practice, which does not promote transparency. The NEEEF therefore does not operate in favour of the people of Namibia. It needs to be legislated to promote socio-economic empowerment.

4. Specific Examples of Empowerment

In the light of the previous discussion and the constitutional mandate for reform, both South Africa and Namibia have introduced measures aimed at employment equity (referred to in Namibia as affirmative action) and skills development in an attempt to provide previously disadvantaged citizens equal employment opportunities. South Africa furthermore specifically deals with community empowerment specifically within the minerals and petroleum industries, which Namibia has to date failed to do.

4.1 Employment Equity and Skills Development

In the light of the history of apartheid and the fact that many persons were excluded from certain offices or never had the opportunity to develop skills, the South African legislature promulgated legislation aimed at redressing these past wrongs. The right to

¹⁷⁰ NEEEF, under the heading (e) *Community Investment*.
¹⁷¹ NEEEF, under the heading (e) *Community Investment*.
¹⁷² NEEEF, under the heading (e) *Community Investment*.
¹⁷³ NEEEF, under the heading (e) *Community Investment*.
¹⁷⁴ NEEEF, under the heading (e) *Community Investment*.
¹⁷⁵ NEEEF, under the heading (e) *Community Investment*.
¹⁷⁶ Stritter (note 124) at 204.

equality guaranteed by the South African Constitution is repeated (albeit in other words) in the Employment Equity Act (“**EEA**”).¹⁷⁷ The EEA obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.¹⁷⁸ It also expressly prohibits unfair discrimination, either directly or indirectly, on a number of grounds. These grounds are: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.¹⁷⁹

Prohibiting unfair discrimination is the EEA’s first approach towards achieving employment equity.¹⁸⁰ Therefore, in terms of the Constitution and the EEA, no employer may discriminate against any employee or applicant for employment on any of the listed grounds. The other, “inherently more controversial”¹⁸¹ approach is to compel designated employers to give preference to categories of persons previously discriminated against, through affirmative action measures.¹⁸² The EEA expressly states that affirmative action measures taken in accordance with the Act does not amount to unfair discrimination.

On the one hand, therefore, the EEA prohibits unfair discrimination. On the other hand, it seeks to encourage employment of those who were previously discriminated against. Through these two approaches, the EEA effectively dismantles an earlier system of social engineering and replaces it with a new system.¹⁸³

¹⁷⁷ Employment Equity Act 55 of 1998.

¹⁷⁸ Section 5 of the EEA.

¹⁷⁹ Section 6(1) of the EEA.

¹⁸⁰ See Grogan *J Dismissal, Discrimination and Unfair Labour Practices* 2ed 2007 Wetton Juta & Co Ltd at 163.

¹⁸¹ Grogan (note 97) at 163.

¹⁸² Chapter III of the EEA; Grogan (note 98) at 163. According to section 12, the affirmative action measures apply only to designated employees. A “designated employer”, in terms of section 1 of the EEA, means “(a) an employer who employs 50 or more employees; (b) an employer who employs fewer than (sic) 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoint it as a designated employer in terms of this act, to the extent provided for in the agreement.”

¹⁸³ Grogan (note 97) at 163.

Aside from promoting equality and encouraging employment of persons previously discriminated against, South Africa also encourages skills development as well. To this effect, the Skills Development Act¹⁸⁴ was promulgated to provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve the skills of the South African workforce.¹⁸⁵ The purposes of this Act are couched in very wide terms, but is ultimately aimed at skills development. The purposes of the Skills Development Act are to be achieved through an institutional and financial framework,¹⁸⁶ encouraging partnership between the public and private sectors of the economy to provide learning in and for the workplace¹⁸⁷ and co-operating with the South African Qualifications Authority.¹⁸⁸

The Skills Development Act is accompanied by the Skills Development Levies Act.¹⁸⁹ In terms of this Act, every employer must, as from 01 April 2001, pay a skills development levy at a rate of 1% of the leviable amount.¹⁹⁰ The leviable amount means the total amount of remuneration, paid or payable, or deemed to be paid or payable, by an employer to its employees during any month,¹⁹¹ subject to certain exclusions.¹⁹² This

¹⁸⁴ Skills Development Act 97 of 1998.

¹⁸⁵ See the Preamble to the Skills Development Act. It includes developing the skills of the South African workforce: (a) to improve the quality of life of workers, their prospects of work and labour mobility; (b) to improve productivity in the workplace and the competitiveness of employers; (c) to promote self-employment; and (d) to improve delivery of social services. It also includes increasing the levels of investment in education and training in the labour market and improving the return on that investments. Furthermore, the purpose of the Act is to encourage employers to use the workplace as an active learning environment, providing employers with the opportunities to acquire new skills, providing opportunities for new entrants to the labour market to gain work experience and employing persons who find it difficult to be employed. The purpose of the Act also includes encouraging workers to participate in learning programmes, improving the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education and ensuring the quality of learning in and for the workplace. Finally, its purpose is to assist work-seekers to find work, retrenched workers to re-enter the labour market, employers to find qualified employees and providing and regulating employment services.

¹⁸⁶ Section 2(2)(a) of the Skills Development Act. The institutional and financial framework comprises: (a) the National Skills Authority; (b) the National Skills Fund; (c) a skills development levy-financing scheme as contemplated in the Skills Development Levies Act; (d) sector education and training authorities; provincial offices of the Department of Labour; (e) labour centres of the Department of Labour; (f) accredited trade test centres; (g) skills development institutes; (h) the Quality Council for Trades and Occupations; (i) a skills development forum for each province; (j) a national artisan moderation body; and (k) Productivity South Africa.

¹⁸⁷ Section 2(2)(b) of the Skills Development Act.

¹⁸⁸ Section 2(2)(c) of the Skills Development Act.

¹⁸⁹ Skills Development Levies Act 9 of 1999.

¹⁹⁰ Section 3(1)(b) of the Skills Development Levies Act.

¹⁹¹ Section 3(4) of the Skills Development Levies Act.

¹⁹² Section 3(5) of the Skills Development Levies Act.

levy is payable by all employers as contemplated in the Fourth Schedule to the Income Tax Act,¹⁹³ but excludes certain employers.¹⁹⁴

The EEA applies to all employees, excluding independent contractors.¹⁹⁵ As such, any petroleum company which employs persons are bound by the EEA. Furthermore, any petroleum company (to which the exclusions discussed above do not apply) will also be liable to pay the skills development levy as contemplated by the Skills Development Levies Act. In this way, petroleum companies contribute towards the socio-economic development of South Africa, thus ensuring that the people of South Africa also benefit from their operations.

To address and rectify discriminatory policies and practices in Namibia, the Affirmative Action (Employment) Act¹⁹⁶ (“AAA”) was promulgated. The AAA outlines measures that relevant employers are required to adhere to to ensure that persons in designated groups enjoy equal opportunities and are fairly represented in the various positions of employment. The designated groups include racially disadvantaged persons, women and person with disabilities. In filling positions of employment a relevant employer must give preferential treatment to suitably qualified persons of designated groups.¹⁹⁷ The AAA only applies to “relevant employers”. In terms of the AAA, relevant employers must submit affirmative action reports to the Commission.¹⁹⁸ A relevant employer is an employer who employs at least 25 persons.¹⁹⁹

¹⁹³ See section 1 of the Skills Development Levies Act, *sv* “employer”.

¹⁹⁴ It excludes any public employer in the national or provincial sphere of government, any public benefit organisation, any national or provincial public entity if 80% or more of its expenditure is defrayed directly or indirectly from funds voted by Parliament and any municipality in respect of which a certificate of exemption has been granted on such conditions and for such period as the Minister of Higher Education and Training may prescribe by regulation, acting in consultation with the Minister of Finance and the Minister for Provincial and Local Government. It also excludes employers in respect of whom there are reasonable grounds for believing that the total amount of remuneration paid or payable by that employer to all its employees during the following twelve month period will not exceed R500,000.00. See section 4 of the Skills Development Levies Act.

¹⁹⁵ Section 1 of the EEA, *sv* “employee”.

¹⁹⁶ Affirmative Action (Employment) Act 29 of 1998, hereinafter referred to as “the AAA”

¹⁹⁷ Section 19(1) of the AAA.

¹⁹⁸ Section 27 of the AAA.

¹⁹⁹ GN 95 in *Government Gazette* 3658 of 01 July 2006.

Where two or more suitably qualified candidates from designated groups qualify for a position of employment, the employer must give priority to a candidate who is a Namibian citizen, or, if all such candidates are Namibian citizens, to the candidate who belongs to more than one designated group.²⁰⁰ A relevant employer must train a Namibian citizen as the understudy of every non-Namibian citizen employed by him.²⁰¹

On 2 June 2008, the Vocational Education and Training Act 1 of 2008 came into operation.²⁰² The purpose of this Act is to establish the Namibian Training Authority, the board of the Namibia Training Authority and the National Training Fund. The purpose is furthermore to regulate the provision of vocational education and training and to provide for the funding of vocational education and training. It also provides for the position of vocational education and training levies.²⁰³

“Vocational education and training” means education and training which provides learners with occupational or work related knowledge and skills. In terms of Section 35 of the Act the Minister of Education may impose a levy to be paid by employers in general or specific categories of employers for the purpose of facilitating and encouraging vocational education and training. Before imposing such a levy the Minister must by notice in the Government Gazette inform affected employers of such intention by specifying the details of the proposed imposition, the reasons for the proposed imposition and the proposed date or dates of commencement of the proposed imposition of levies. The Minister must also invite affected employers to make representations to the Minister within 30 days of publication of the notice.

On 11 April 2013 the Minister of Education published a notice in the Government Gazette informing employers of the intention to impose a vocational education and training levy.²⁰⁴ This levy is intended to be payable by every employer with an annual payroll of N\$350 000.00 or more.²⁰⁵ The intended levy will therefore be binding on all employers in Namibia who have an annual payroll in excess of N\$350 000.00. The rate

²⁰⁰ Section 19(2) of the AAA.

²⁰¹ Section 19(3) of the AAA.

²⁰² Vocational Education and Training Act 1 of 2008.

²⁰³ See the Preamble to the Vocational Education and Training Act.

²⁰⁴ GN84 in *Government Gazette* 5171 of 11 April 2013.

²⁰⁵ Section 3 of GN 84 in *Government Gazette* 5171 of 11 April 2013.

of the proposed levy is 1.5% of the annual payroll of the employer concerned.²⁰⁶ The reason for the proposed imposition of the levy is to utilise the funds to provide financial and technical assistance to employers, vocational education and training providers, employees, learners and other persons or bodies, to promote vocation education and training and to fund education, training programmes and projects.²⁰⁷ The date of commencement of imposition of the levy is 1st September 2013 and levies are payable on or before the 20th day of the following month and every other month.²⁰⁸

The affirmative action and skills development measures are legislated and therefore transparent. The AAA and the Vocational Training and Education Act are clear on what is to be expected of employers and what the consequences of non-compliance are, thus is promotes accountability as well. Furthermore, they contain clear, direct ways of ensuring that the people of Namibia are benefitted by obliging employers to use local employees and to contribute towards skills development.

4.2 Community Empowerment

Many countries have to deal with claims by indigenous communities for mineral or petroleum resources and for greater involvement in the exploitation of these resources.²⁰⁹ Given Namibia and South Africa's history of colonialism and apartheid, this issue should be treated as particularly relevant. Despite this, the Namibian Petroleum Act does not contain any special treatment in respect of communities, as is the case with its South African counterpart. Furthermore, there has been no noticeable discussion or examination in Namibia of the rights of communities in respect of mineral or petroleum resources.²¹⁰ In South Africa, however, the rights of communities in respect of mineral and petroleum resources has received some prominent discussions – also in the Constitutional Court – and the legislative framework for petroleum recognises the rights of communities.

²⁰⁶ Section 5 of GN 84 in *Government Gazette* 5171 of 11 April 2013.

²⁰⁷ Section 6 of the GN 84 in *Government Gazette* 5171 of 11 April 2013.

²⁰⁸ Section 7 of GN 84 in *Government Gazette* 5171 of 11 April 2013.

²⁰⁹ Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 87.

²¹⁰ Whether communities have any claim in respect of petroleum resources in terms of international law is beyond the scope of this thesis.

The well-known trilogy of cases concerning the Richtersveld-community²¹¹ illustrates how claims by indigenous people in respect of their land and mineral wealth have been disregarded by colonial powers.²¹² The Richtersveld is a large stretch of land in the north-western part of the Northern Cape Province.²¹³ This area has been inhabited by the Richtersveld Community for centuries.²¹⁴ A part of the Richtersveld along the Gariep (Orange) River, registered in the name of Alexkor (Pty) Ltd, formed the subject of the claim.²¹⁵ The Community's claim was based on the Restitution of Land Rights Act.²¹⁶ The Constitutional Court found that the Richtersveld Community had communal ownership of the land in question under indigenous law.²¹⁷ The right of the Community includes the right to exploit natural resources.²¹⁸ The annexation by the British Crown in 1847 did not change the rights that the community held over the land²¹⁹ and as at 19 June 1913, the indigenous law ownership of the Richtersveld Community in respect of the land in question remained unchanged.²²⁰ Nevertheless, the Precious Stones Act²²¹ promulgated in 1927 did not recognise the rights of those who were owners of land under indigenous law as their rights were not registered and therefore treated as unalienated Crown land.²²² The effect this the seemingly neutral Precious Stones Act rendered the occupation of the land by the Community unlawful and subsequently dispossessed it of the rights it had as indigenous owner.²²³ The Court therefore held that the Richtersveld Community was entitled to restitution of its land.²²⁴ The Richtersveld claim "demonstrates that discrimination was so ingrained in the fabric of

²¹¹ *Richtersveld Community v Alexkor (Pty) Ltd* 2001 (3) SA 1293 (LCC); *Richtersveld Community v Alexkor (Pty) Ltd* 2003 (6) SA 104 (SCA); *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

²¹² Mostert H *Mineral Law: Principles and Policies in Perspective* (2012) Cape Town Juta and Co. Ltd. at 32.

²¹³ *Alexkor / Richtersveld* (note 211) at [4].

²¹⁴ *Alexkor / Richtersveld* (note 211) at [4].

²¹⁵ *Alexkor / Richtersveld* (note 211) at [5].

²¹⁶ Restitution of Land Rights Act 22 of 1994. In terms of section 2(1) of this Act, a person shall be entitled to restitution of a right in land if it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices and the claim for restitution is lodged no later than 31 December 1998.

²¹⁷ *Alexkor / Richtersveld* (note 211) at [62] and [64].

²¹⁸ *Alexkor / Richtersveld* (note 211) at [62] and [64].

²¹⁹ *Alexkor / Richtersveld* (note 211) at [65].

²²⁰ *Alexkor / Richtersveld* (note 211) at [81].

²²¹ Precious Stones Act 44 of 1927.

²²² *Alexkor / Richtersveld* (note 211) at [89].

²²³ *Alexkor / Richtersveld* (note 211) at [90].

²²⁴ *Alexkor / Richtersveld* (note 211) at [102].

South African society that even laws that on the face of it may have been racially neutral could have had a discriminatory result.”²²⁵

The MPRD Act acknowledges the right of communities in respect of minerals and petroleum.²²⁶ It provides specific measures in respect of communities by granting communities a preferent right to explore for and produce petroleum on land registered or to be registered in the name of the community.²²⁷ The preferent right (regardless of whether it is an exploration or production right) is valid for a maximum period of five years, but may be renewed further periods of five years each.²²⁸ It is subject to prescribed terms and conditions.²²⁹ It is not possible to obtain a preferent reconnaissance permit.

Any community who wishes to obtain a preferent exploration or production right must lodge an application for an exploration or production right with the Minister.²³⁰ The Minister must grant the application if all the requirements have been met.²³¹ Most of the general requirements for applications for exploration and production rights must be met.²³² However, to accommodate communities, when applying for a production right two of the communities need not be met.²³³ The first is that it is not necessary for the community to provide financially or otherwise for the prescribed social and labour plan.²³⁴ Secondly it is also not necessary for the application to show that granting thereof will promote the socio-economic objectives of the MPRD Act.²³⁵

²²⁵ Mostert (note 211) at 33.

²²⁶ See for example the preamble, where it is stated that the MPRD Act recognises “the need to promote local and rural development and the social upliftment of communities affected by mining”.

²²⁷ Section 1 of the MPRD Act defines a community as “a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.”

²²⁸ Section 104(3)(a) of the MPRD Act.

²²⁹ Section 104(3)(b) of the MPRD Act.

²³⁰ Section 104(1) of the MPRD Act.

²³¹ Section 104(2) of the MPRD Act.

²³² See Chapter Five above.

²³³ Section 104(2)(e) of the MPRD Act.

²³⁴ Section 104(2)(e) read with section 23(1)(e) of the MPRD Act.

²³⁵ Section 104(2)(e) read with section 23(1)(h) of the MPRD Act.

Notwithstanding the accommodation made by the Minister, three additional requirements have to be met. The first requirement is that the right must be used to contribute towards the development and the social upliftment of the community.²³⁶ The second requirement is that the community must submit a development plan, indicating the manner in which the right is going to be exercised.²³⁷ The third requirement is that the envisaged benefits of the exploration or production project will accrue to the community in question.²³⁸

The preferent right may not be granted if another right under the MPRD Act has already been granted over the area.²³⁹ In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*²⁴⁰ the Constitutional Court held that it appears that the MPRD Act creates a special category of rights for communities.²⁴¹ It held that an application for a prospecting right might have the effect of disentitling a community of its preferent right, thus materially and adversely affecting the right of the community.²⁴² As a result, before a prospecting right (or mining right, exploration right or production right) is granted over an area registered or to be registered in the name of the community, the community must be given an opportunity to make representations or, in appropriate cases, to make an application for the relevant right.²⁴³

5. Transformation and Empowerment of the Petroleum Industry

The MPRD Act states that the South African Minister of Mineral Resources must, within five years from the date on which the MPRD Act comes into force, develop a code of good practice for the minerals industry in the Republic and, after consultation with the Minister for Housing, develop a housing and living conditions standard for the

²³⁶ Section 104(2)(a) of the MPRD Act.

²³⁷ Section 104(2)(b) of the MPRD Act.

²³⁸ Section 104(2)(c) of the MPRD Act.

²³⁹ Section 104(4) of the MPRD Act.

²⁴⁰ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

²⁴¹ *Bengwenyama / Genorah* (note 240) at [73].

²⁴² *Bengwenyama / Genorah* (note 240) at [73].

²⁴³ *Bengwenyama / Genorah* (note 240) at [73].

minerals industry.²⁴⁴ In line with this, the Minister developed a housing and living condition standard and code of good practice for the minerals industry.²⁴⁵

The obligation on the Minister to develop a housing and living condition standard and code of good practice applies to the petroleum industry as well.²⁴⁶ Despite this, however, no separate standard and code has been developed for the petroleum industry.²⁴⁷ Furthermore, the existing housing and living conditions standard for the minerals industry and mining code of good practice are silent as to whether they apply to the petroleum industry as well.²⁴⁸ The leading commentaries on mineral and petroleum law in South Africa, while acknowledging that the Minister is obliged to develop a housing and living conditions standard and code of good practice for the petroleum industry as well, is silent as to whether the existing documents in respect of the minerals industry apply to the petroleum industry as well.²⁴⁹ For purposes of this thesis, it will be assumed that these documents apply only to the minerals industry.²⁵⁰

Notwithstanding the fact that the housing and living conditions standard and the code of good practice only apply to the minerals industry, a *Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry* (“**Petroleum Charter**”) was signed prior to the enactment of the MPRD Act.²⁵¹ It was reproduced as Schedule 1 to the Petroleum Products Amendment Act,²⁵² which gives “teeth to the Charter”.²⁵³ Government's regulatory framework and industry agreements must strive to facilitate the objectives of the Petroleum Charter.²⁵⁴

The Petroleum Charter was developed to provide a framework for promoting the empowerment of historically disadvantaged South Africans (“**HDSA**”) in the liquid

²⁴⁴ Section 100(1) of the MPRD Act.

²⁴⁵ Badenhorst and Mostert (note 3) at 23-10.

²⁴⁶ Section 69(2) of the MPRD Act.

²⁴⁷ Badenhorst and Mostert (note 3) at 23-10.

²⁴⁸ Badenhorst and Mostert (note 3) at 23-10.

²⁴⁹ Badenhorst and Mostert (note 3) at 23-10; Dale et al (note 2) at MPRDA-590.

²⁵⁰ This is supported by the fact that these documents themselves only refer to the minerals industry.

²⁵¹ See Badenhorst P, Mostert H and Dendy M "Minerals and Petroleum" in WA Joubert (ed) *The Law of South Africa* Vol 18, 2 ed (2007) Durban, LexisNexis Butterworths at 136; Badenhorst and Mostert (note 3) at 23-38.

²⁵² Petroleum Products Amendment Act 58 of 2003. See Badenhorst and Mostert (note 3) at 23-38.

²⁵³ Benjamin, Raditapole and Taylor (note 4) at 1-12.

²⁵⁴ Petroleum Charter under the heading *Regulatory Framework and Industry Agreements*.

fuels industry. HDSA is defined in the Petroleum Charter as “all persons and groups who have been discriminated against on the basis of race, gender and/or disability”.²⁵⁵ Despite the fact that the Petroleum Charter was reproduced in an act dealing with the downstream petroleum industry, it applies to the privately owned parts of the industry and to all parts of the value chain, including the upstream (exploration and production) petroleum industry as well.²⁵⁶

The success of the Petroleum Charter depends on the disposition of those who have responsibility for managing the process.²⁵⁷ In terms of the Petroleum Charter, member companies and Government undertake to appoint to such positions managers who will understand the spirit and background under which the policies of the Petroleum Charter were conceived to create a supportive and enabling environment for business success.²⁵⁸ Member companies undertake to foster a supportive culture with regard to all aspects of the Petroleum Charter when dealing with HDSAs.²⁵⁹ Companies further subscribe to incorporating and driving a process of transformation and a change of culture in their statements of business principles.²⁶⁰ The Petroleum Charter acknowledges that the South African labour market does not produce enough of the skills required by the petroleum industry, especially the HDSA oil companies.²⁶¹ Organized industry and government must work together in addressing this skills gap. In its bilateral relations with relevant countries, the South African Government endeavours to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with oil companies operating outside of South Africa.²⁶² The petroleum industry furthermore undertakes to build the skills of its employees and report on progress annually in an agreed format.²⁶³ The industry, through the standing consultative arrangements,

²⁵⁵ See the Petroleum Charter under the heading *Interpretation*.

²⁵⁶ See the Petroleum Charter under the heading *Scope of Application*; Badenhorst and Mostert (note 3) at 23-39.

²⁵⁷ Petroleum Charter under the heading *Supportive Culture*.

²⁵⁸ Petroleum Charter under the heading *Supportive Culture*.

²⁵⁹ Petroleum Charter under the heading *Supportive Culture*.

²⁶⁰ Petroleum Charter under the heading *Supportive Culture*.

²⁶¹ Petroleum Charter under the heading *Capacity Building*.

²⁶² Petroleum Charter under the heading *Capacity Building*.

²⁶³ Petroleum Charter under the heading *Capacity Building*.

interfaces with statutory bodies (such as sectoral education and training authority) in the development of skills development strategies.²⁶⁴

The Petroleum Charter also deals with employment equity. In terms of the Petroleum Charter, companies publish their employment equity targets and achievements and subscribe to the following: (a) South African subsidiaries of multinational companies and South African companies focus their overseas placement and/or training programmes on HDSAs; (b) identifying a talent pool and fast-tracking it; (c) ensuring inclusiveness of gender; (d) implementing mentorship programmes; and (e) setting and publishing "stretch" (i.e. demanding) targets and their achievement.²⁶⁵

Similar to the BBE Act, the Petroleum Charter promotes procurement. Participants in the petroleum industry subscribe to and adopt supportive procurement policies to facilitate and leverage the growth of HDSA companies.²⁶⁶ These policies include criteria that favour procurement companies.²⁶⁷ The scope of procurement must include supplies, products and all other goods and services.²⁶⁸ HDSA companies are accorded preferred supplier status as far as possible.²⁶⁹ Government will engage with State Tender authorities to draw their attention to the Energy Policy White Paper milestones with respect to economic empowerment of HDSAs, with the aim of giving effect to supportive procurement policies within this sector.²⁷⁰

The Petroleum Charter attempts to reform the petroleum industry in respect of access to and ownership of joint facilities.²⁷¹ Access to large infrastructure for the movement and storage of crude oil and petroleum products is acknowledged as a critical weakness.²⁷² In this regard owners of such facilities must provide third parties with non-discriminatory access to uncommitted capacity. HDSA companies are to be given fair

²⁶⁴ Petroleum Charter under the heading *Capacity Building*.

²⁶⁵ Petroleum Charter under the heading *Capacity Building*.

²⁶⁶ Petroleum Charter under the heading *Private Sector Procurement*.

²⁶⁷ Petroleum Charter under the heading *Private Sector Procurement*.

²⁶⁸ Petroleum Charter under the heading *Private Sector Procurement*.

²⁶⁹ Petroleum Charter under the heading *Private Sector Procurement*.

²⁷⁰ Petroleum Charter under the heading *Private Sector Procurement*.

²⁷¹ Petroleum Charter under the heading *Access and Ownership of Joint Facilities*.

²⁷² Petroleum Charter under the heading *Access and Ownership of Joint Facilities*.

opportunity to acquire ownership in such facilities.²⁷³ Access to refining capacity also represents a key weakness in HDSA companies' supply chain.²⁷⁴

In respect of the upstream petroleum industry, the activity of oil and gas exploration and production is acknowledged as a high-risk activity that provides limited opportunities for new entrants.²⁷⁵ Government must continue to make licences subject to the following conditions: (a) all rights for exploration and production in the country's offshore area reserve must make at least 9% available for buy-in;²⁷⁶ and (b) all right holders must contribute funds toward the "Upstream Training Trust" to fund skills development at various levels and as discoveries are made, further skills development strategies must be devised to empower HDSAs in this sector.²⁷⁷ While these provisions ensure that the interests of the people of South Africa are protected, they may operate to dissuade investors, who may not be willing to make a percentage of their petroleum rights available for buy-in.

Finance is also a serious constraint for HDSA companies in terms of the Petroleum Charter.²⁷⁸ In the light of this, the South African government must assist industry in explaining the milestones in the White Paper on Energy Policy as well as explaining the needs and characteristics of the industry to financing institutions, both private and public.²⁷⁹ Companies must investigate and implement internal and external financing mechanisms for giving HDSA companies access to equity ownership within the South African context.²⁸⁰ Companies must also consider engaging HDSA companies in viable strategic partnerships.²⁸¹ Industry participants also acknowledge that terms of credit are important to HDSA companies and agree to take this into account in bilateral activities.²⁸²

²⁷³ Petroleum Charter under the heading *Access and Ownership of Joint Facilities*.

²⁷⁴ Petroleum Charter under the heading *Access and Ownership of Joint Facilities*.

²⁷⁵ Petroleum Charter under the heading *Upstream*.

²⁷⁶ Petroleum Charter under the heading *Upstream*.

²⁷⁷ Petroleum Charter under the heading *Upstream*.

²⁷⁸ Petroleum Charter under the heading *Financing*.

²⁷⁹ Petroleum Charter under the heading *Financing*.

²⁸⁰ Petroleum Charter under the heading *Financing*.

²⁸¹ Petroleum Charter under the heading *Financing*.

²⁸² Petroleum Charter under the heading *Financing*.

It is recognized in the Petroleum Charter that the achievement of the objectives set out in the Petroleum Charter entails an ongoing process.²⁸³ The Department of Minerals Resources must conduct an annual survey of the industry to evaluate progress in achieving the objectives of the Energy Policy White Paper.²⁸⁴ Companies must submit such data as is required at the end of each year, including employment equity data and procurement targets.²⁸⁵ The aggregated information must be published and forms the basis of the annual forum.²⁸⁶

The Petroleum Charter is therefore very clear on how empowerment in the petroleum industry is to be achieved, which operates in favour of the people of South Africa. The openness of the Charter furthermore provides transparency not only for the actors within the upstream petroleum industry, but also for the general public. The Petroleum Charter is unique in a sense in that it is incorporated as a schedule to an existing Act, which gives it more force than other charters.²⁸⁷

The Petroleum Charter envisages that, within ten years after the date of the Charter (ie by 2010), at least 25% ownership and control of all facets of the petroleum industry must be transferred to HDSAs.²⁸⁸ The due date has passed, and the achievement of the objectives has been mixed – it is clear that the primary objective of 25% ownership and control has not been met.²⁸⁹ A comprehensive audit carried out by the Department of Energy has found that only 50% of companies to which the Petroleum Charter is applicable has met the 25% obligation.²⁹⁰ Compliance with management control was good, but companies were not all fully compliant. The average compliance with supportive culture was rated “medium”, while company performance in capacity building was high in some indicators, but there was low performance in identifying a talent pool and fast tracking, implementing mentoring programs and overseas

²⁸³ Petroleum Charter under the heading *Consultation, Monitoring, Evaluation and Reporting*.

²⁸⁴ Petroleum Charter under the heading *Consultation, Monitoring, Evaluation and Reporting*.

²⁸⁵ Petroleum Charter under the heading *Consultation, Monitoring, Evaluation and Reporting*.

²⁸⁶ Petroleum Charter under the heading *Consultation, Monitoring, Evaluation and Reporting*.

²⁸⁷ Benjamin, Raditapole and Taylor (note 4) at 1-12.

²⁸⁸ Petroleum Charter under the heading *Interpretation*.

²⁸⁹ Dale et al (note 2) at RFLS-7.

²⁹⁰ Department of Energy *Petroleum and Liquid Fuels Charter Final Audit Report* (2011) at 104, available at http://www.energy.gov.za/files/media/Pub/PetroleumAndLiquidFuelsCharter_AuditReport.pdf [accessed 21.02.2015].

placement programs.²⁹¹ The companies measured generally scored low on the employment equity element and only two made palpable strides in crude procurement.²⁹² Companies have performed well in terms of providing finance to HDSA's for ownership deals and the majority of companies are also doing well in terms of offering HDSA customers terms of credit.²⁹³

Despite the above, it should be noted that the Petroleum Charter is merely a statement of intent and does not create binding obligations.²⁹⁴ However, after the Petroleum Charter was published, the BEE Act was promulgated which does contain binding provisions. These obligations apply to petroleum companies as well and is discussed above in detail.

Aside from the Petroleum Charter, there are various provisions within the MPRD Act which deals specifically with transformation and empowerment in the petroleum industry. To this effect, the preamble to the MPRD Act reaffirms the state's commitment to reform to bring about equitable access to the country's mineral and petroleum resources. It further expresses its commitment to eradicating all forms of discriminatory practices in the mineral and petroleum industries and takes into consideration the state's obligation under the South African Constitution to take legislative and other measures to redress the results of past racial discrimination.²⁹⁵

The statements made in the preamble to the MPRD Act are reiterated in section 2, which sets out the objects of the Act. The objects, however, are stated in more detail, especially insofar as they relate to socio-economic empowerment. First, the MPRD Act seeks to promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa.²⁹⁶ This object of the MPRD Act is intended to give effect to Parliament's constitutional obligation to provide redress through legislative means for the discrimination which took place in the mining industry in the past.²⁹⁷ Secondly, the objects of the MPRD Act include substantially and meaningfully expanding

²⁹¹ Department of Energy (note 290) at 104.

²⁹² Department of Energy (note 290) at 104.

²⁹³ Department of Energy (note 290) at 104.

²⁹⁴ Dale et al (note 2) at RFLS-7.

²⁹⁵ Preamble to the MPRD Act.

²⁹⁶ Section 2(c) of the MPRD Act.

²⁹⁷ Dale et al (note 2) at MPRDA-117.

opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.²⁹⁸ Thirdly, the objects include promoting employment and advance the social and economic welfare of all South Africans.²⁹⁹ These two objects are of particular importance, especially in view of the fact that the objects must be kept in mind when interpreting the provisions of the MPRD Act.³⁰⁰ A number of other provisions – dealing with applications for and granting of rights to petroleum –refer back specifically to these objects.³⁰¹ Finally, the objects of the MPRD Act include ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.³⁰²

In the light of the preamble and the socio-economic objectives set out in section 2, the MPRD Act itself contains various empowerment provisions. So, for example, under the MPRD Act applications for exploration and production rights received by the designated agency on the same day must be treated as received at the same time, but the Minister must give preference to applications by historically disadvantaged persons.³⁰³

When considering an application for an exploration right, the Minister must grant the application *inter alia* if granting the licence will promote employment and advance the social and economic welfare of all South Africans³⁰⁴ and will substantially and meaningfully expand opportunities for historically disadvantaged persons (including women) to enter the petroleum industry and to benefit from the exploitation of the nation's petroleum resources.³⁰⁵ The same applies when the Minister considers an application for a production licence,³⁰⁶ with the added requirement that the granting of

²⁹⁸ Section 2(d) of the MPRD Act.

²⁹⁹ Section 2(f) of the MPRD Act.

³⁰⁰ See section 4(1) of the MPRD Act. See also Dale et al (note 2) at MPRDA-118.

³⁰¹ This is discussed in more detail in Chapter Five above.

³⁰² Section 2(i) of the MPRD Act.

³⁰³ Section 69(2) read with section 9(1)(a) and section 9(2) of the MPRD Act. Applications received on different dates must be treated in the order in which they are received. See also Badenhorst and Mostert (note 49) at 23-42.

³⁰⁴ Section 80(1)(g) read with section 2(f) of the MPRD Act.

³⁰⁵ Section 80(1)(g) read with section 2(d) of the MPRD Act.

³⁰⁶ Section 84(1)(i) read with section 2(d) and section 2(f) of the MPRD Act.

the production licence must be in accordance with the Petroleum Charter and the prescribed social and labour plan.³⁰⁷

Namibia does not have a specific policy document dealing with the transformation of the petroleum industry. However, as with the South African legislation dealing with the upstream petroleum industry, the Namibian upstream petroleum industry contains various measures aimed at socio-economic reform. So, for example, it is a standard term of every exploration and production licence that the licence holder will, in the employment of employees, give preference to Namibian citizens who possess appropriate qualifications for purposes of the operations to be carried out in terms of such licence.³⁰⁸ Holders must also carry out training programmes to encourage and promote the development of such citizens in such person's employment.³⁰⁹ For this purpose, the Minister may enter into agreements with licence holders providing for the implementation of training programmes referred to in that paragraph and the contribution of moneys to the trust known as the Petroleum Training and Education Fund, for promoting the objects of that trust.³¹⁰

After due regard being had to the need to ensure technical and economic efficiency, holders must make use of products, equipment and services which are available in Namibia.³¹¹ Finally, it is a standard term that a holder co-operate with other persons involved in the petroleum industry to enable such citizens to develop skills and technology to render services in the interest of such industry in Namibia.³¹²

The Petroleum Act therefore contains further measures of ensuring a benefit or the Namibian people. Because these measures are made conditions of licences, they provide for accountability as the Namibian state is obliged to ensure that the conditions are met, failing which the licence may be cancelled. The Act is also clear on what exactly the conditions in respect of socio-economic empowerment are, unlike the NEEEF. It therefore provides greater transparency.

³⁰⁷ Section 84(1)(g) of the MPRD Act.

³⁰⁸ Section 14(1)(a) of the Petroleum Act.

³⁰⁹ Section 14(1)(b) of the Petroleum Act.

³¹⁰ Section 14(2) of the Petroleum Act.

³¹¹ Section 14(1)(c) of the Petroleum Act.

³¹² Section 14(1)(d) of the Petroleum Act.

6. Comparative Assessment and Concluding Remarks

In terms of the Namibian and South African Constitutions, the state is obliged to put measures in place to ensure that past discriminatory practices are abolished and replaced with a new, equitable system that redresses past wrongs. This is done through various provisions in the regulatory framework for petroleum, additional legislation and policy documents dealing with empowerment and legislation dealing with affirmative action, employment equity and skills development.

South Africa has implemented various measures to promote socio-economic empowerment in the country as a whole, as well as in the petroleum industry. Framework legislation has been passed to deal with black economic empowerment, which is applicable to the petroleum companies as well. The BEE Act and the accompanying Code and Scorecard obliges companies, including petroleum companies, to pursue certain socio-economic goals. These instruments must be taken into account by the Minister of Mineral Resources when she grants rights to petroleum. The Petroleum Charters adds on to these empowerment measures and contains certain directs ways of empowerment, including buy-ins. The MPRD Act itself also contains various measures aimed at empowerment. Finally, South African legislation deals with employment equity and skills development. The EEA on the one hand prohibits discrimination in the labour context and the other hand promotes affirmative action. The Skills Development Act furthermore obliges employees to contribute towards skills development in South Africa.

BEE in South Africa has, however, been faced with problems right from the start. The empowerment programme appeared to benefit only a small number of former ANC activists.³¹³ The cronyism and corruption that accompanied BEE has lead Archbishop Desmond Tutu to condemn BEE, claiming it only benefits a small “recycled elite”.³¹⁴ The criticism for BEE has led to attempts to promote more “broad-based” BEE, which is contained in the current framework.³¹⁵ Despite this, BEE remains subject to

³¹³ Schneiderman D “Promoting Equality, Black Economic Empowerment, and the Future of Investment Rules” (2009) *SAJHR* 246 at 252.

³¹⁴ Schneiderman (note 313) at 253.

³¹⁵ Schneiderman (note 313) at 253.

criticism, with some claiming that it is used to enrich already prominent and empower black people who are politically well-connected.³¹⁶

Namibia has not achieved the same as South Africa when it comes to socio-economic empowerment. As with South Africa, Namibia prohibits unfair discrimination in the labour context and promotes affirmative action and skills development. However, Namibia does not have the framework legislation that South Africa has in respect of BEE. This may result in positive discrimination associated with BEE principles being applied on an *ad hoc* and arbitrary basis.³¹⁷ The NEEEF is the second policy document to set out Namibia's policy in respect of BEE, but to date no further steps have been taken towards legislating NEEEF. To ensure transparency and accountability, it needs to be legislated. Finally, as with South Africa, however, Namibia's Petroleum Act contains various measures aimed at empowerment and binding on petroleum licence holders.

Both countries attempt to establish a proper framework for socio-economic development, which is applicable to petroleum companies as well. This is not only necessary to ensure that the people of South Africa and Namibia benefit from the petroleum resources in these countries through the activities of petroleum companies, but it is also necessary for transparency and accountability to have a proper framework for socio-economic development. The danger is, however, that imposing socio-economic obligation throughout various statutes and policy documents creates uncertainty and makes it difficult to impose. The legislature and the executive must be careful in not over-regulating socio-economic development, thereby discouraging investors.

³¹⁶ Sibanyoni M "BEE Cake Only for Elite Few – Banker" *Sowetan Live* 25 October 2014, available at <http://www.sowetanlive.co.za/business/2014/10/25/bee-cake-only-for-elite-few---banker> [accessed 21.02.2015]; Collins M "Opinion – A New Kind of Apartheid: Analysing South Africa's 'Class Struggle'" *RNews* 19 December 2014, available at <http://www.rnews.co.za/article/2212/opinion-a-new-kind-of-apartheid-analysing-south-africa-s-class-struggle> [accessed 21.02.2015]; Sergeant B "Mines for the Taking" *Noseweek* 1 January 2015, available at <http://www.noseweek.co.za/article/3353/Mines-for-the-taking> [accessed 21.02.2015].

³¹⁷ Hopwood G *Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploration* (2013) Windhoek Institute for Public Policy Research at 6.

Chapter Nine:

ACCOUNTABILITY AND TRANSPARENCY: LIMITING STATE CONTROL OVER PETROLEUM RESOURCES

1. Introduction

Hitherto in this thesis the focus was on the state's power to control petroleum resources in South Africa and Namibia. However, a proper regulatory framework must ensure that a state is accountable to its citizens and to petroleum companies in exercising its right to control petroleum resources. The purpose of this chapter is discuss the limitations imposed on a state in exercising its control over petroleum resources to ensure that the element of accountability is present in the regulatory framework. This in turn ensures that the petroleum regulatory framework operates for the benefit of both the citizens of the host country and the petroleum company. This chapter specifically looks at how the state's power as administrative body is limited in terms of the provisions of administrative justice and how corruption is controlled.

2. Limitations on the Regulation of Petroleum

Rights to petroleum are regulated by statute and allocated by public authorities. This public law character of petroleum law invokes the principles of fair and reasonable administrative justice. The state, in its relationship with an applicant applying for rights to petroleum or a holder of a right to petroleum, has a duty towards the applicant or holder to act within the confines of administrative law and the constitutional guarantee of just administrative action.¹

Whereas the discussion above concerns the role of the state in the regulation of petroleum resources, and pays attention to the functionaries involved in allocating rights to petroleum, the second part of this chapter focuses on the measures put in place

¹ See Article 18 of the Constitution of the Republic of Namibia, 1990 ("**Namibian Constitution**") and section 33 of the Constitution of the Republic of South Africa, 1996 ("**South African Constitution**").

in Namibia and South Africa to promote just administrative action, access to information and the prevention and combating of corruption. These are some of the main mechanisms for limiting the powers of the states in respect of petroleum resources. This part of the chapter focuses on means to achieve just administrative action and promote access to information, and how to prevent or combat corruption. These aspects are crucial to any attempts at ensuring accountability, transparency and interest-balancing as the trilogy of elements necessary to create a sound regulatory structure.²

In the first instance, this part of the chapter deals with how the right to just administrative action ensures transparency of a petroleum regulatory regime and accountability of the state as against the nation. This is achieved by limiting the powers of the state, acting through the elected government, in respect of the control it exercises over petroleum resources.³ The right to just administrative action is, however, not enough to ensure a sound regulatory framework. Corrupt practices, ingrained in the business of oil,⁴ pose a serious challenge and pervade the industry especially as governments have to contend with bribery of officials in charge of controlling access to petroleum resources⁵ and determining below market-related prices for such access.⁶ It is therefore important for a regulatory framework for petroleum resources to prevent and combat corruption as well.

2.1 The Right to Just Administrative Action

The introduction of the concept of custodianship over mineral and petroleum resources in South Africa marked a transition from privately-held mineral and petroleum rights to a system of state-granted mineral and petroleum entitlements.⁷ In Namibia, on the

² For further detail about these elements, see Chapter One above.

³ See paragraphs 2.2. below with reference to the common law right of just administrative action and paragraph 2.2.2.4. below with reference to procedural fairness.

⁴ Humphreys M, Sachs JD and Stiglitz JE "Introduction: What is the Problem with Natural Resource Wealth?" in Humphreys M, Sachs JD and Stiglitz JE (eds), *Escaping the Resource Curse* (2007) New York Columbia University Press at 11.

⁵ Humphreys, Sachs and Stiglitz (note 4) at 10–11.

⁶ Humphreys, Sachs and Stiglitz (note 4) at 11.

⁷ Dale MO "Comparative International and African Mineral Law as Applied in the Formation of the New South African Mineral Development Legislation" in Bastida E, Wälde T and Warden-Fernández J (eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) The Hague Kluwer Law International at 823.

other hand, mineral and petroleum resources are vested in the state.⁸ In both jurisdictions, however, it is clear that the state control petroleum resources.

2.1.1 The Framework for Just Administrative Action

While petroleum law is primarily administered under the MPRD Act, it must be administered against the backdrop of the constitutional guarantee for just administrative action.⁹ Petroleum administration therefore takes place within a wider framework determined by the South African Constitution,¹⁰ the Promotion of Administrative Justice Act¹¹ (“**PAJA**”) and the MPRD Act. The MPRD Act states that, subject to PAJA, any administrative process conducted or decision taken under the MPRD Act must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness, thus invoking the elements of just administrative action.¹²

The right to just administrative action in South Africa is entrenched in the Bill of Rights and must be seen against the background of a history of abuse of governmental powers in South Africa, which was briefly referred to above.¹³ In terms of the South African Constitution, every person has the right to administrative action that is lawful, reasonable and procedurally fair.¹⁴ Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.¹⁵ The Legislature is tasked with a duty to enact national legislation to give effect to the right to lawful, reasonable and procedurally fair administrative action.¹⁶

⁸ Article 100, Constitution of the Republic of Namibia, 1990.

⁹ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 1 ed (2004, Revision Service 10 2014) Wetton Juta at 2-1.

¹⁰ South African Constitution.

¹¹ Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”).

¹² Section 6(1) of the MPRD Act 28 of 2002.

¹³ Currie I and De Waal J *Bill of Rights Handbook* 5 ed (2005) Cape Town Juta & Co at 642.

¹⁴ Section 33(1) of the South African Constitution.

¹⁵ Section 33(2) of the South African Constitution.

¹⁶ Section 33(3) of the South African Constitution. This legislation must provide for the review of administrative action by a court or, where appropriate, and independent and impartial tribunal. The legislation must further impose a duty on the state to give effect to the right of everyone to administrative justice that is lawful, reasonable and procedurally fair and the right to be given reasons for an administrative decision that adversely affects his rights. Finally, the legislation must promote an efficient administration.

The legislature, in response to the constitutional mandate to enact national legislation dealing with administrative justice, adopted and promulgated PAJA. The purpose of PAJA is to give effect to section 33 of the South African Constitution,¹⁷ in other words, to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, as well as the right to be given written reasons for administrative actions.¹⁸

The Minister, together with the Deputy-Director, Regional Managers and other officers of the Department, therefore administer petroleum resources under the MPRD Act. This Act, and the functions and duties ascribed to these persons in terms of the Act, does not exist in isolation but must be seen against the backdrop of the constitutional guarantee of just administrative action and the provisions of PAJA, which operate to control and limit the powers, functions and duties of the Minister, Deputy-Director, Regional Managers and other officers.

As in South Africa, the regulation of petroleum in Namibia must take place against the backdrop of the constitutional guarantee of the right to fair and reasonable administrative justice.¹⁹ This right must be respected and upheld by the Executive, Legislature and Judiciary and all organs of Government and its agencies and, where applicable to them, by all natural and legal persons.²⁰

The Constitution of the Republic of Namibia²¹ (**“Namibian Constitution”**) incorporates the common law principles of administrative law which have crystallised over many years.²² The Namibian Constitution requires that administrative bodies and administrative officials must act fairly and reasonably. Furthermore, they must comply with the requirements imposed upon them by common law and relevant legislation.

¹⁷ Klaaren J and Penfold G "Just Administrative Action" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5, 2013) Cape Town Juta & Co. Ltd. at 63-1.

¹⁸ Long title of the PAJA.

¹⁹ Article 18 of the Namibian Constitution.

²⁰ Article 5 of the Namibian Constitution.

²¹ Article 18 of the Namibian Constitution.

²² *Permanent Secretary of the Ministry of Finance and Others v Ward* 2009 (1) NR 314 (SC) at par [25].

Any person aggrieved by the exercise of administrative acts and administrative decisions has a right to seek redress before a competent court or tribunal.²³

Therefore, in Namibia the Minister, Commissioner and Chief-Inspector administers petroleum resources under the Petroleum Act. As with South Africa, however, this Act and the powers, functions and duties ascribed to these persons in terms of the Act do not exist in isolation but must be seen against the backdrop of the constitutional guarantee of just administrative action, which controls and limits the powers, functions and duties of the Minister, Commissioner and Chief-Inspector.

The right to just administrative action in South Africa and Namibia is available to all persons and not just citizens of these countries.²⁴ The principles of administrative justice can therefore be relied upon by the petroleum companies engaging with the state to obtain access to petroleum. The right to just administrative action may also be used by any other person to hold the state accountable for its actions, provided that this person is aggrieved in some way by a decision made by the state in respect of petroleum.²⁵

In terms of the South African Constitution, the right of just administrative action must be respected and upheld by the executive, legislature and the judiciary, as well as all organs of state.²⁶ It must also be respected and upheld by natural and, where applicable, juristic persons.²⁷ The common law remains applicable as long as it is not inconsistent with the Constitution.²⁸ In Namibia, neither Parliament nor any subordinate legislative authority may make any laws and which abolishes or abridges the fundamental rights and freedoms conferred by the Bill of Rights. The Executive and agencies of Government may also not take any action which abolishes or abridges

²³ Article 18 of Namibian Constitution.

²⁴ See the wording of this right in section 33 of the South African Constitution (“Everyone has the right...”) and article 18 of the Namibian Constitution (“...persons aggrieved by the exercise of such acts...”).

²⁵ See Chapter Four above.

²⁶ Section 8(1) of the South African Constitution and article 5 of the Namibian Constitution.

²⁷ Section 8(2) of the South African Constitution and article 5 of the Namibian Constitution.

²⁸ Section 8(3)(a) of the South African Constitution and Article 66 of the Namibian Constitution.

the fundamental rights and freedoms conferred by the Bill of Rights.²⁹ Any law or action in contravention of the aforesaid is invalid to the extent of the contravention.³⁰

The constitutional guarantee of just administrative action does not mean that a court will hear any application for review merely because it is based on this right.³¹ Firstly, the person bringing the application must have the necessary standing. Standing in terms of the South African Constitution is framed very widely. Any person acting in his own interest, on behalf of another person who cannot act in their own interest, as a member of or in the interest of a group or class of persons or in the public interest, or an association acting in the interest of its members has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. The court may grant appropriate relief, including a declaration of rights.³²

In Namibia, any aggrieved persons who claim that a fundamental right or freedom guaranteed by the Namibian Constitution has been infringed or threatened is entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require.³³ A court has the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of the Namibian Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.³⁴ The power of the court includes the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and

²⁹ Article 25(1) of the Namibian Constitution.

³⁰ A competent court, however, instead of declaring the law or action invalid, has the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government to correct any defect in the impugned law or action within a specific period of time, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid. See article 25(1)(a) of the Namibian Constitution.

³¹ See Currie and De Waal (note 13) at 79.

³² Section 38 of the South African Constitution.

³³ Article 25(2) of the Namibian Constitution.

³⁴ Article 25(3) of the Namibian Constitution.

freedoms, where such an award is considered appropriate in the particular circumstances.³⁵

What is clear from the concept of standing is that the applicant must be aggrieved, i.e. the applicant must show that his rights have been injured or wronged.³⁶ The Namibian legal system generally does not allow class actions or public interest litigation. The South African Constitution, however, allows public interest litigation by stating that a person acting in the public interest has standing under the South African Constitution.³⁷ Any of the rights or fundamental freedoms contained in the Bill of Rights or any other common law right can be infringed. The list is endless, and includes e.g. the right to human dignity, the right to a fair trial, the right to life, the right to freedom of speech, the right to freedom of association and the right to practise any profession, or carry on any occupation, trade or business.

Aside from standing, other potential impediments to an application for review of an administrative action are ripeness and mootness.³⁸ The doctrine of ripeness prevents any person from seeking relief from a court before that person has been subject to prejudice or the real threat of prejudice.³⁹ This also aligns with the concept of an aggrieved person, discussed above.

The doctrine of mootness, on the other hand, requires an affected person not to wait for too long to bring a case to court, as this might result in the underlying dispute being somehow resolved, rendering an application to court moot.⁴⁰ Courts may also dismiss an application where the applicants have waited too long to bring the matter before court, resulting in the respondent being prejudiced. For example, in the Namibian case of *Samicor Diamond Mining (Pty) Ltd v Minister of Mines and Energy and Others*,⁴¹ the applicants applied to the High Court to have the granting and issuing to Baobab

³⁵ Article 25(4) of the Namibian Constitution.

³⁶ See the discussion of “aggrieved person” in Claassen RD *Dictionary of Legal Words and Phrases* Vol 1 (2008, Service Issue 11) Durban LexisNexis Butterworths at A-81–A-82.

³⁷ Section 38 of the South African Constitution.

³⁸ Currie and De Waal (note 13) at 79; Loots C “Standing, Ripeness and Mootness” in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5, 2013) Cape Town Juta & Co Ltd at 7-14–7-22.

³⁹ Loots (note 38) at 7-14.

⁴⁰ Loots (note 38) at 7-18.

⁴¹ *Samicor Diamond Mining (Pty) Ltd v Minister of Mines and Energy and Others* 2014 (1) NR 1 (HC).

Equity Management (Pty) Ltd of two exclusive prospecting licences in respect of minerals reviewed and set aside. The court dismissed the application, despite good merits, because the applicants waited too long in approaching the Court, during which delay Baobab invested a considerable amount in the licences. The Court held that Baobab would be prejudiced or at least potentially prejudiced if the application was granted.⁴² The Court held that it is “*in the interest of the administration of justice and in the public interest that finality in relation to the granting or refusal of mineral licences be reached within a reasonable time.*”⁴³

In conclusion, any person who wants to take a decision by the Minister on review in respect of a right to petroleum must show standing. For example, if a person’s right or licence is refused and application is granted to a competing applicant, that person will have standing as its rights were directly affected. Similarly, if application for renewal or amendment of a right or licence is refused, the holder will have standing. The person intending to take the decision on review must, however, ensure that its right is not affected by the doctrines of ripeness and mootness. For example, application cannot be brought until a decision has actually been made. An applicant also cannot bring the application after such a long period has passed that application to court will be moot or the respondents will be prejudiced by the delay.

2.1.2 The Role of the Common Law of Just Administrative Action

As stated earlier,⁴⁴ South Africa and Namibia share the same common law. This extends to the common law principles relating to administrative law. In the pre-constitutional eras in both South Africa and Namibia, courts relied on their inherent jurisdiction to review the exercise of public power.⁴⁵ By reviewing the exercise of public power, courts have developed and applied a set of judge-made rules of review with which entities exercising public power had to comply.⁴⁶

Common-law grounds of review include, *inter alia*, if the decision maker arrived at the decision arbitrarily or capriciously; or through bad faith; or through unwarranted

⁴² *Samicor / Minister of Mines* (note 41) at [47].

⁴³ *Samicor / Minister of Mines* (note 41) at [48].

⁴⁴ See Chapter One above.

⁴⁵ Klaaren and Penfold (note 17) at 63-1.

⁴⁶ Klaaren and Penfold (note 17) at 63-1.

adherence to a fixed principle; or to further an ulterior or improper purpose.⁴⁷ A misconception of the discretion conferred upon an administrative body or official was also grounds for review under common law, as was gross unreasonableness to such an extent as to warrant an inference that the administrator failed to apply his mind to the matter. Finally, failing to apply the rules of natural justice (such as *nemo iudex in re sua* and *audi alteram partem*) was also a ground for review under the common law.⁴⁸

Notwithstanding the common law power of courts to review exercise of public power, parliamentary sovereignty was the governing principle of state organisation in South Africa and Namibia⁴⁹ and so the will of the Parliament reigned supreme.⁵⁰ The application of the principles of judicial review was subject to the whim of Parliament and as a result, "...South Africa's history of administrative law and practice is littered with instances of abuses of power..."⁵¹ This was particularly visible with regard to segregatory laws,⁵² but also with regard to mining and petroleum laws.⁵³

A radical break came with the adoption of the principle of constitutional supremacy,⁵⁴ first in Namibia after it gained political independence. Soon thereafter South Africa followed suit and both countries now acknowledge the right to just administrative action in their respective Constitutions.⁵⁵ Constitutional entrenchment of just administrative action has transformed an ordinary right into a fundamental human right protected by the Constitution.⁵⁶ South Africa has gone on step further and promulgated legislation dealing specifically with administrative law to give effect to this

⁴⁷ *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152.

⁴⁸ *Johannesburg Stock Exchange* (note 47) at 152; Klaaren and Penfold (note 17) at 63-1.

⁴⁹ Through the Mandate that South Africa had over Namibia. See Chapter One above.

⁵⁰ Klaaren and Penfold (note 17) at 63-2.

⁵¹ Klaaren and Penfold (note 17) at 63-2.

⁵² Klaaren and Penfold (note 17) at 63-2.

⁵³ The primary ones being the Black Land Act 18 of 1936 and the Group Areas Act 63 of 1975. In *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at [86]–[91], the discriminatory (dispossessory) effect of the Precious Stones Act 44 of 1927 is discussed. See also Mostert H *Mineral Law: Principles and Policies in Perspective* (2012) Cape Town Juta and Co. Ltd. at 30–35 and 51–53.

⁵⁴ See with regard to South Africa Klaaren and Penfold (note 17) at 63-2.

⁵⁵ See section 33 of the Constitution of the Republic of South Africa, 1996 and article 18 of the Constitution of the Republic of Namibia, 1990.

⁵⁶ Parker C "The 'Administrative Justice' Provision of the Constitution of the Republic of Namibia: a Constitutional Protection of Judicial Review and Tribunal Adjudication under Administrative Law" 1991 (24) *The Comparative and International Law Journal of Southern Africa* 88 at 89; Currie and De Waal (note 13) at 644–645.

constitutional right, namely PAJA. The common law of just administrative action has been subsumed by the South African Constitution⁵⁷ and, as a result, there are no two separate systems of administrative law in South Africa.⁵⁸ This does not mean that the South African Constitution has done away with the common law relating to administrative law.⁵⁹ The common-law rules relating to administrative law are used to inform and supplement the South African Constitution and PAJA.⁶⁰ In Namibia, the common-law principles of just administrative action are still applicable. These common-law principles are not replaced by the Namibian Constitution, but are used to supplement and interpret the constitutional guarantee of just administrative action.

2.1.3 Principles of Just Administrative Action

In South Africa, petroleum is primarily regulated by the Department of Mineral Resources, while this function is fulfilled in Namibia by the Ministry of Mines and Energy. The administration of rights to petroleum is accompanied by a myriad of decisions that administrators may take. These decisions may relate to the granting of access to petroleum, suspending or cancelling or rights to petroleum or imposing certain conditions on rights to petroleum. These decisions are taken either by the Minister responsible for administering rights to petroleum, or someone who has delegated authority from the Minister to act on his behalf. Some action may also be taken by other Ministers (for example the Minister responsible of the environment or the Minister responsible for finance).⁶¹

The administration of the MPRD Act in South Africa and the Petroleum Act in Namibia therefore takes place within the framework of the Constitutional guarantee to just administrative action and the common-law right to administrative justice. The fact that the regulation of petroleum is performed by administrative bodies or administrative agents and therefore constitutes administrative action in respect of petroleum is further

⁵⁷ Specifically, section 33 of the South African Constitution.

⁵⁸ *Pharmaceutical Manufacturers Association of SA, In Re: Ex Parte Application of the President of the RSA* 2000 (2) SA 674 (CC) at par 44. See also Burns Y and Beukes M *Administrative Law under the 1996 Constitution* 3 ed (2006) Durban LexisNexis Butterworths at 286.

⁵⁹ Hoexter C *Administrative Law in South Africa* 2 ed (2012) Wetton Juta & Co Ltd at 29.

⁶⁰ Burns and Beukes (note 58) at 286. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at par 22. See also Hoexter (note 59) at 29.

⁶¹ See Chapters Five, Six and Seven above.

supported by the fact that the MPRD Act specifically mentions any administrative process conducted or decision taken under the MPRD Act must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.⁶² As a result, the administration of petroleum must be lawful and reasonable and proper procedure must be followed. This includes failure to take decisions in respect of petroleum. PAJA specifically contemplates the review of action which consists of a failure to take a decision.⁶³

So, for example, in Namibia and South Africa the granting or refusal to grant a right to minerals or a renewal of a right to minerals has been a ground for review in a number of cases.⁶⁴ Similarly, in South Africa, attaching certain conditions to a surface right permit has also been a ground for review.⁶⁵ The primary decisions in respect of petroleum resources (awarding and refusing rights to petroleum and attaching conditions to rights to petroleum) constitute administrative actions because of the nature of these decisions and the fact that they are taken in terms of empowering legislation. Other decisions taken in respect of petroleum resources have to be determined on a case-by-case basis with reference to the principles set out in case law. The measure of discretion awarded to a functionary in respect of each decision depends on the relevant statutory provision in terms of which the decision is based. Discretion when taking decisions is discussed next under the concept of lawfulness.

The right to just administrative action is therefore applicable to the regulation of petroleum. It may only be limited in accordance with the provisions set out in the Constitutions of South Africa and Namibia. By entrenching the right to just administrative action, providing fixed methods of limiting this right and ensuring that this right may be enforced in a competent and independent court, the legislative framework for just administrative action in South Africa and Namibia provides

⁶² Section 6(1) of the MPRD Act.

⁶³ Section 6(2)(g) of PAJA.

⁶⁴ See for example *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC); *Auas Diamond Co (Pty) Ltd v Minister of Mines and Energy* 2006 (2) NR 406 (HC); *Otjozondou Mining (Pty) Ltd v Minister of Mines and Energy and Another* 2007 (2) 469 (HC); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* 1999 (4) SA 375 (T); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC); *Meepo v Kotze and Others* 2008 (1) SA 104 (NC).

⁶⁵ *Kloof Gold Mining Co Ltd v Mining Commissioner, Johannesburg, and Others* 1981 (4) SA 509 (T).

transparency and accountability for persons operating within this industry and for persons affected by this industry.⁶⁶

The classification of decisions taken in respect of petroleum triggers various elements of just administrative action. The MPRD Act specifically requires that decisions in respect of petroleum must be taken within a reasonable time, must be lawful, reasonable and procedurally fair. Persons affected by decisions taken under the MPRD Act are also entitled to written reasons.⁶⁷ Although not expressly stated in the Namibian legislation, all these principles apply to decisions taken in respect of petroleum in Namibia as well, by virtue of the common-law right of just administrative action, entrenched in the Namibian Constitution. Other principles that are also applicable are the duty to consult with interested and affected parties and the right of access to information. All these elements are now discussed in the context of the administration of petroleum resources.

2.1.3.1 Reasonable Time

The element of “reasonable time” in the MPRD Act reflects a similar provision in PAJA.⁶⁸ In terms of PAJA, a court or tribunal has the power to review an administrative decision if the action concerned consists of a failure to take a decision.⁶⁹ An applicant may bring an application for review on the ground of failure to take a decision in two instances. First, where an administrator has a duty to make a decision, the empowering statute states no time periods within which the administrator must make a decision and the administrator fails to take a decision, then the applicant may institute review proceedings on the ground that the administrator failed to take a decision.⁷⁰ Secondly, where the administrator has a duty to make a decision, the empowering statute prescribes a time period within which a decision must be taken and the administrator fails to make a decision within this time period, then the application may institute review proceedings on the ground that the administrator has failed to take

⁶⁶ Hughes T “South Africa: A Driver of Change” (2012) Working Paper Series, Revenue Watch Institute at 6.

⁶⁷ Section 6 of the MPRD Act.

⁶⁸ Section 6(2)(g) read with section 6(3) of PAJA.

⁶⁹ Section 6(2)(g) of PAJA.

⁷⁰ Section 6(3)(a) of PAJA.

a decision within the prescribed time period.⁷¹ Important in both instances is that there must be an obligation on the administrator to make a decision – an administrator, for example, cannot be taken on review as a result of his indecisiveness in planning on policy issues.⁷² Determining what is reasonable will depend on each specific case according to the nature and complexity of the decision or process concerned.⁷³

Under common law, an aggrieved person has a similar remedy in the form of a mandamus, which is an order compelling a public authority to comply with a statutory duty imposed upon it.⁷⁴ In an application for a mandamus, a court does not concern itself with reason why the administrator has failed to carry out its statutory duty, but rather that it has failed or refused to exercise a statutory power and the applicant has been aggrieved by the failure.⁷⁵ Importantly, as with the application to compel an administrator to make a decision under PAJA, the applicant in a mandamus application also has to show that there is a duty on the administrator to perform the act in question.⁷⁶ The common law mandamus serves two purposes. The first is to compel the performance of a specific duty. The second is to remedy the effects of unlawful action already taken.⁷⁷ So, for example, the mandamus can be used against an administrator responsible for issuing licences who refuses to take a decision to issue a licence.⁷⁸ This includes situations where an administrator who has to take a decision to grant a right to petroleum refuses or unreasonably delays in granting such a right. Similarly, a mandamus can also be used to compel a decision-maker to correct a decision that was unlawfully taken, provided that it is possible to correct the decision.⁷⁹

⁷¹ Section 6(3)(b) of PAJA.

⁷² *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) at [43].

⁷³ Dale M, Bekker L, Bashall F, Chaskalson M, Dixon C, Grobler G, Loxton C, Ash M and Cox A *South African Mineral and Petroleum Law* (2005, Service Issue 16 2014) Durban LexisNexis Butterworths at MPRDA-152.

⁷⁴ *Thusi v Minister of Home Affairs and Another and 71 Other Cases* 2011 (2) SA 561 (KZP) at [42]; *Tumas Granite CC v Minister of Mines and Energy and Another* 2013 (2) NR 383 (HC) at [6].

⁷⁵ *Tumas / Minister of Mines* (note 74) at [6].

⁷⁶ *Thusi / Minister of Home Affairs* (note 74) at [43]; Baxter L *Administrative Law* (1984) Cape Town Juta & Co Ltd at 691.

⁷⁷ Baxter (note 76) at 687 and 690; *Tumas / Minister of Mines* (note 74) at [6].

⁷⁸ Baxter (note 76) at 690.

⁷⁹ Baxter (note 76) at 691.

2.1.3.2 Lawfulness

The second element of just administrative action is lawfulness. It is a well-recognised principle of common law that persons are entitled to lawful administrative action.⁸⁰ This is a fundamental principle of the Rule of Law⁸¹ upon which both South Africa's and Namibia's Constitutions are based.⁸² The inclusion of lawfulness as a requirement for just administrative action in the South African and Namibian Constitutions may seem unnecessary at first, but it provides a greater measure of protection because common-law principles of administrative legality was applied inconsistently.⁸³ In fact, this is particularly important in the natural resources industry. As we have seen from the introduction, states, through the elected governments, often control access to natural resources to promote their own interests, rather than the interests of its people. Even in Namibia, the promise of the extractive industry is overshadowed by allegations of corruption.⁸⁴ Corruption in the petroleum industry is discussed in more detail later in this chapter.

Lawfulness entails that the functionary taking the administrative decision must be duly authorised by law (either statutory or common law) and must comply with any applicable statutory requirements or conditions.⁸⁵ In other words, the administrative body or administrative official must act within the boundaries imposed upon them by statute or common law.⁸⁶ Any action performed by a functionary without lawful authority is illegal or *ultra vires*.⁸⁷ PAJA reiterates this by allowing judicial review of

⁸⁰ Burns and Beukes (note 58) at 50.

⁸¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Other* 1999 (1) SA 374 (CC) at par 56; De Ville J *Judicial Review of Administrative Action in South Africa* Revised 1 ed (2005) Durban LexisNexis Butterworths at 90.

⁸² See section 1(c) of the South African Constitution and article 1(1) of the Namibian Constitution.

⁸³ Burns and Beukes (note 58) at 50.

⁸⁴ See for example Asino T "Corruption Tarnishes Extractive Sector" 10 September 2012 *New Era*, available at <http://www.newera.com.na/articles/47564/-Corruption-tarnishes-extractive-sector-> [accessed 12.08.2013]; Brandt E "IPPR Calls for More Accountability in Extractive Sector" 24 June 2013 *New Era*, available at <http://www.newera.com.na/articles/47564/-Corruption-tarnishes-extractive-sector-> [accessed 12.08.2013]; Khobetsi L "Lack of Transparency in Mining Creates Opportunity for Corruption" 07 December 2011 *The Economist*, available at <http://www.economist.com.na/2011-12-07-11-05-31/speak-your-mind/28-mining/3424-lack-of-transparency-in-mining-creates-opportunity-for-corruption> [accessed 12.08.2013].

⁸⁵ Hoexter (note 59) at 253.

⁸⁶ Hoexter (note 59) at 255; Baxter (note 76) at 355; Burns and Beukes (note 58) at 50.

⁸⁷ Hoexter (note 59) at 255 – 256.

administrative action where the administrator was not authorised by an empowering provision to take the decision.⁸⁸

Of particular importance for the principle of lawfulness is the delegation of powers: where functionaries act on delegated authority, this authority must be properly delegated.⁸⁹ This is in line with the principle *delegatus delegare non potest*, or a delegate may not delegate.⁹⁰ Where an administrator's authority is granted to it by enabling legislation, it must exercise that authority itself. It may only delegate its authority if the enabling statute provides for such delegation.⁹¹ Delegation may either take place by means of decentralisation or deconcentration of public powers.⁹² A decentralisation of public power is where the powers of a functionary are transferred to an independent organ or body, which carries out these functions and powers in its own name.⁹³ Any decision taken by the delegate must be regarded as a decision of that delegate. Deconcentration, on the other hand, refers to a situation where the delegate exercises powers on behalf of a functionary and any decision by the delegate must be regarded as a decision of the delegans, or functionary.⁹⁴ It is important for giving effect to the principle of lawfulness and the administration of justice to have a proper appreciation of any delegation of authority and to know who is regarded as taking a decision. This is also important for exhausting internal remedies, discussed later in this chapter.

Lawfulness further requires administrators remain within the bounds of their power and do not misconstrue their powers.⁹⁵ Administrators must work out their own jurisdiction to act in a certain circumstances.⁹⁶ Judicial review, however, allows courts to consider whether administrators have exceeded or misconstrued their powers.⁹⁷ A

⁸⁸ Section 6(2)(a)(i) of PAJA. There are a number of instances where an administrator may not have proper authority to act. It may be that the administrator is not properly constituted, qualified or appointed when he took the decision. Hoexter (note 59) at 256.

⁸⁹ De Ville (note 81) at 139.

⁹⁰ De Ville (note 81) at 139.

⁹¹ De Ville (note 81) at 139.

⁹² *Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy and Others* [2007] JOL 21122 (O) at [6].

⁹³ *Global Pact / Minister of Minerals and Energy* (note 92) at [6].

⁹⁴ *Global Pact / Minister of Minerals and Energy* (note 92) at [6].

⁹⁵ Hoexter (note 59) at 281; Baxter (note 76) at 452.

⁹⁶ Baxter (note 76) at 452; Hoexter (note 59) at 259.

⁹⁷ Hoexter (note 59) at 281.

misinterpretation of functions by a functionary responsible for administering petroleum or granting authorisations incidental to petroleum operations is reviewable. The reviewability of such decisions ensures greater transparency and accountability in the regulation of petroleum.

Lawfulness finally entails that an administrator not abuse his discretion. Abuse of discretion as a ground for review deals with the courts' power to interpret and define the ambit of the authority conferred by legislation upon an administrator.⁹⁸ Under common law, three grounds for abuse of discretion have become well established and have also assumed statutory form in PAJA in South Africa. These grounds are *mala fides*, ulterior motive and failure to apply the mind.⁹⁹ Where a court finds that power has been used for unauthorised purposes or purposes that were not contemplated at the time when the powers were conferred, it will hold that the action or decision is unlawful.¹⁰⁰ The purpose envisaged in enabling legislation is binding on the administrator acting pursuant to this legislation.¹⁰¹ PAJA also states that action taken for a reason not authorised by the empowering provision¹⁰² or for an ulterior purpose or motive¹⁰³ may be reviewed. So, for example, if an administrator issues a right to petroleum in exchange for personal financial reward, this will render the decision unlawful.¹⁰⁴ Similarly, suspending or cancelling a right to petroleum because of personal differences between the administrator and the holder will also be unlawful. These actions may also be *mala fide*.

Administrative action not authorised by law is invalid. Invalidity is an "axiomatic consequence of the principle of legality."¹⁰⁵ So, for example, when awarding exploration or production rights or licences or attaching conditions or renewing or suspending these rights or licences, the relevant Minister must act lawfully, meaning he must act within the boundaries of the empowering legislation and common law, where

⁹⁸ Hoexter (note 59) at 306.

⁹⁹ Hoexter (note 59) at 307.

¹⁰⁰ Hoexter (note 59) at 309.

¹⁰¹ Hoexter (note 59) at 308.

¹⁰² Section 6(2)(e)(i) of PAJA.

¹⁰³ Section 6(2)(e)(ii) of PAJA.

¹⁰⁴ It may also lead to criminal sanctions for corruption, which is discussed later in the chapter.

¹⁰⁵ Baxter (note 76) at 355.

applicable.¹⁰⁶ In Namibia, for example, the Minister is imposing socio-economic obligations on holders of petroleum licences without there being a proper framework therefore.¹⁰⁷ The government's policy in respect of socio-economic empowerment is imposed haphazardly and this leads to "uncertainty, confusion and anxiety".¹⁰⁸ This is contrary to the right of just administrative action and the principles of transparency and accountability.

The petroleum resources of South Africa and Namibia are regulated primarily by the Minister of Mineral Resources and the Minister of Mines and Energy respectively.¹⁰⁹ Other entities may only exercise rights in respect of petroleum if authorised to do so by an enabling statute or if these powers are properly delegated to these entities. So, for example, the MPRD Act enables the Minister to delegate any power conferred upon him (except the power to make regulations and to deal with an appeal) to the Director-General, Regional Manager or any officer, provided that the delegation is done in writing.¹¹⁰ The Petroleum Act in Namibia, on the other hand, does not contain such a delegation clause, but instead makes special provision for the appointment of further officers and sets out their powers, duties and functions.¹¹¹ The Act also grants the Minister the power to prescribe any power, duty or function.¹¹² When exercising control over petroleum, the functionaries charged with doing so must have proper authorisation. They cannot, for example, impose socio-economic obligations without there being a proper framework for it.¹¹³

¹⁰⁶ See Chapter Five below which discusses rights to petroleum.

¹⁰⁷ See Chapter Eight above, which discusses socio-economic development in the Namibian petroleum industry.

¹⁰⁸ Koep PF and Van den Berg HM "Current Issues in the Namibian Petroleum Industry" 2010 *The Chambers Magazine* 111 at 111.

¹⁰⁹ Section 3(2) of the MPRD Act states that, as the custodian of South Africa's mineral and petroleum resources, the state, *acting through the Minister of Mineral Resources*, may grant, issue, refuse, control, administer and manage rights in respect of and in consultation with the Minister of Finance, prescribe and levy, any fee payable under the MPRD Act. Similarly, section 12(4)(a) of the Petroleum Act authorises the Minister of Mines and Energy in Namibia to issue petroleum licences.

¹¹⁰ Section 103(1) of the MPRD Act.

¹¹¹ Section 3(1) of the Petroleum Act.

¹¹² Section 3(1) of the Petroleum Act.

¹¹³ See Koep and Van den Berg (note 108) at 111.

2.1.3.3 Reasonableness

The requirement of acting reasonably deals with the substance of the decision or action taken.¹¹⁴ It overlaps with lawfulness, because unreasonable administrative action in general relates to abuse of discretionary power or the unreasonable exercise of discretionary power.¹¹⁵ Reasonableness permits the courts to go beyond the procedural requirements and examine the nature of the act, to determine whether the administrator acted *mala fide* or from improper motives or on extraneous considerations or under a view of the facts or the law which could not reasonably be entertained.¹¹⁶

When the Constitutions of Namibia and South Africa came into operation in 1990 and 1996 respectively, a major step was taken towards a single requirement of reasonableness. Both the Namibian and the South African Constitutions now require administrative action to be reasonable, thus incorporating a unified standard of reasonableness.¹¹⁷ Although it is still difficult to provide a single, simple meaning of the concept of reasonableness, one can fairly say that reasonableness consists of two elements, namely rationality and proportionality.¹¹⁸

PAJA introduces a four-pronged rationality test¹¹⁹ in terms whereof administrative action is reviewable if there is no rational connection between the action itself and the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.¹²⁰ A mere rational connection is required, not an ideal or perfect rationality.¹²¹

The purpose of this four-pronged rationality test is to ensure that the administrative action has a sound and rational basis.¹²² An irrational decision is one that is not based on reason generally but on an abuse of discretionary power or a failure by the

¹¹⁴ *Erastus Tjiumdikua Kahuure and 10 Others v Mbanderu Traditional Authority and 2 Others* (unreported judgment delivered on 13 April 2007, case number A 114/2006) at par [64].

¹¹⁵ Burns and Beukes (note 58) at 390.

¹¹⁶ *Kahuure* (note 114) at par [64].

¹¹⁷ Section 33 of the South African Constitution, 1996 and article 18 of the Namibian Constitution.

¹¹⁸ Hoexter (note 59) at 340.

¹¹⁹ Burns Y (original text by Wiechers M) "Administrative Law" in Joubert WA (ed) *Law of South Africa Vol 1* 2ed (2003) Durban LexisNexis Butterworths at par 140.

¹²⁰ Section 6(2)(f)(ii) of PAJA.

¹²¹ Hoexter (note 59) at 342.

¹²² Burns (note 119) at par 136.

administrator to apply his mind.¹²³ Rationality is closely linked to the reasons for the decision.¹²⁴ Administrative action is justified by the reasons that support the action.¹²⁵ Under the common law, no clear cut right existed as to the right to reasons for decisions taken by administrators.¹²⁶ Where the administrator had wide discretion to make its own decisions, reasons for such decisions was not usually necessary. However, in some instances, for example where a statute provided for the right to appeal or some right of recourse to a higher body or tribunal, the courts deduced ulterior or improper motives and even *mala fides* where the administrator refused to furnish reasons.¹²⁷ While there was no obligation on an administrator to furnish reasons for his or her decisions under common law, refusal to give reasons might lead to distrust in the administrator and might impact negatively on the administration as a whole.

The importance of reasons for administrative action is highlighted by the South African Constitution and PAJA. The Constitution states that every person whose rights have been adversely affected by administrative action has the right to be given written reasons for the decision.¹²⁸ Furthermore, PAJA states that any person whose rights have been materially or adversely affected by an administrative decision is entitled to reasons for the decision.¹²⁹

There have been various attempts by Namibian courts to define reasonableness in the light of the Constitution. In the *Mostert*-case,¹³⁰ the court held that reasonableness, in the court's opinion, means that the decision of the administrator must be rationally justified.¹³¹ Rationality implies that a decision of an administrator must be supported by the evidence and information before the administrator, as well the reasons given for the decision. Furthermore, the decision must also be objectively capable of furthering

¹²³ Burns (note 119) at par 136. Burns mentions the example of arbitrary decisions; decisions unsupported by evidence; a decision where there is no connection between the decision and the reasons provided for the decision; or where the reasons themselves are unintelligible.

¹²⁴ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at par 42, where the Supreme Court of Appeal in South Africa stated that "[t]he right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action."

¹²⁵ Burns (note 119) at par 139.

¹²⁶ Burns and Beukes (note 58) at 251.

¹²⁷ Burns and Beukes (note 58) at 251 and the authorities cited there.

¹²⁸ Section 33(2) of the South African Constitution.

¹²⁹ Section 5(1) of PAJA.

¹³⁰ *Mostert v The Minister of Justice* 2003 NR 11 (SC).

¹³¹ *Mostert* (note 130) at 28H.

the purpose for which the power was given and for which the decision was purportedly taken.¹³² The duty to give reasons is, according to the Court, implicit in the constitutional right of just administrative action.¹³³ It is therefore clear that the Namibian law with regard to rationality of administrative decisions is practically similar to South African law under PAJA.

Despite the position under common law, it is beyond doubt that modern South African and Namibian law requires written reasons as an important element of just administrative action. This is recognised in the MPRD Act – any administrative process conducted or decision taken in terms of this Act must be in writing and must be accompanied by written reasons for such decision.¹³⁴

The right to be given reasons for an administrative decision is limited to those persons who have been adversely affected by the decision. Any person requiring written reasons for a decision must show that he has been adversely affected by the decision. For example, an applicant for a right to petroleum whose application is refused would be in a position to apply for written reasons, as he is adversely affected by the decision.

Reasonableness does not consist only of rationality.¹³⁵ Another aspect of reasonableness is proportionality. The purpose of proportionality, succinctly summarised by Hoexter, is to strike a balance between the adverse and beneficial effects of administrative action and to encourage the administrator to consider the need for the action and the possibility of using less drastic or oppressive means to achieve the desired end.¹³⁶ Proportionality has been accepted as an essential requirement in administrative law.¹³⁷ Under common law, it was used in a wide and narrow sense. In its widest sense, it served as a general rubric for the requirements of reasonableness, fairness and good administration.¹³⁸ In a more narrow sense, it expressed the idea that

¹³² Hoexter (note 59) at 307.

¹³³ *Immigration Selection Board v Frank* 2001 NR 107 (SC) at 174.

¹³⁴ Section 6(2) of the MPRD Act.

¹³⁵ Hoexter (note 59) at 343.

¹³⁶ Hoexter (note 59) at 344. See also Burns and Beukes (note 58) at 408 where the authors state as follows: “Generally speaking, proportionality is a principle that requires a reasonable and justifiable relationship between the objectives of the administrative decision and the facts and circumstances which were taken into consideration by the administrator in reaching the decision.”

¹³⁷ Hoexter (note 59) at 345.

¹³⁸ Baxter (note 76) at 528.

the extent to which the action of public authorities may infringe individual rights should not go beyond the degree necessary for serving the public interest.¹³⁹

Proportionality has three essential elements: balance, necessity and suitability.¹⁴⁰ This means in essence that there must be a balance between the adverse and beneficial effects, the administrator must consider the need for the action as well as consider less invasive means to accomplish the goal, and the administrator must use lawful and appropriate means to reach this goal.¹⁴¹

PAJA does not specifically refer to proportionality. Instead, it states that a court may review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in terms of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.¹⁴² This section therefore in essence requires proportionality between the decision and the effect of the decision.

2.1.3.4 Procedural Fairness

In his seminal work on administrative law, Baxter stated that “[t]he duty to act fairly is nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms.”¹⁴³ The rules of natural justice are summarised in the two maxims *audi alteram partem*¹⁴⁴ and *nemo iudex in sua propria causa*.¹⁴⁵ The first principle is concerned with giving persons an opportunity to have a say in decisions that affect them and thereby be able to interfere in the outcome thereof.¹⁴⁶ The second principle is often also called the rule against bias.¹⁴⁷ It implies that decision-makers ought to be impartial. It further implies that the decision is made in good faith.¹⁴⁸ *Bona fides* is a requirement for both fairness and reasonableness. Sources of bias can be financial interest, personal interest, bias on the subject matter (eg where the decision-

¹³⁹ Baxter (note 76) at 528.

¹⁴⁰ Hoexter (note 59) at 344.

¹⁴¹ Hoexter (note 59) at 344.

¹⁴² Section 6(2)(h) of PAJA. See also Hoexter (note 59) at 345.

¹⁴³ Baxter (note 76) at 595.

¹⁴⁴ “Listen to the other side.” See Burns and Beukes (note 58) at 318.

¹⁴⁵ “No one may be a judge in his own case.”

¹⁴⁶ Hoexter (note 59) at 363.

¹⁴⁷ Hoexter (note 59) at 451.

¹⁴⁸ *Kahuure* (note 114) at par [62].

maker has openly associated himself or herself with one side) or official or institutional bias (eg bias as a result of your office).¹⁴⁹ This is particularly relevant in the petroleum industry in the light of the reputation of corruption that is attached to this industry.¹⁵⁰

Fairness and natural justice are concerned with procedure.¹⁵¹ The common-law principles of natural justice are now reinforced by the Constitution insofar as it is not inconsistent with the Constitution.¹⁵² The right to procedurally fair administrative action is stated explicitly in the Constitutions of South Africa and Namibia. The South African Constitution states that everyone has the right administrative action that is procedurally fair,¹⁵³ while the Namibian Constitution states that administrative bodies and administrative officials must act fairly.¹⁵⁴

PAJA states that fair administrative procedure depends on the circumstances of each case.¹⁵⁵ To give effect to the right to procedurally fair administrative action, the administrator must give a person whose rights or legitimate expectations are materially and adversely affected by the action adequate notice of the nature and purpose of the proposed administrative action.¹⁵⁶ The affected person must also be given a clear statement of the administrative action¹⁵⁷ and must be given reasonable opportunity to make representations.¹⁵⁸ Where applicable, the affected person must be given adequate notice of any right of review or internal appeal¹⁵⁹ and must be given adequate notice of the right to request reasons for the decision.¹⁶⁰ The administrator may, however, if it is reasonable and justifiable in the circumstances, depart from any of these requirements.¹⁶¹ The administrator may also, in his own discretion, give an affected

¹⁴⁹ Hoexter (note 59) at 454 – 459.

¹⁵⁰ See paragraph 4 in this Chapter.

¹⁵¹ *Kahuure* (note 114) at par [64].

¹⁵² *Viljoen and Another v Inspector-General of the Namibian Police* 2004 NR 225 (HC) at 241.

¹⁵³ Section 33(1) of the South African Constitution.

¹⁵⁴ Article 18 of the Namibian Constitution.

¹⁵⁵ Section 3(2)(a) of PAJA.

¹⁵⁶ Section 3(2)(b)(i) of PAJA.

¹⁵⁷ Section 3(2)(b)(iii) of PAJA.

¹⁵⁸ Section 3(2)(b)(ii) of PAJA.

¹⁵⁹ Section 3(2)(b)(iv) of PAJA.

¹⁶⁰ Section 3(2)(b)(v) of PAJA.

¹⁶¹ Section 3(4)(a) of PAJA. In determining whether a departure is reasonable and justifiable, an administrator must take into account all relevant factors. This includes: (i) the objects of the empowering provision; (ii) the nature and purpose of, and the need to take, the administrative action; (iii) the likely effect of the administrative action; (iv) the urgency of taking the

person an opportunity to obtain assistance and, in serious or complex cases, legal representation,¹⁶² to present and dispute information and arguments¹⁶³ and to appear in person.¹⁶⁴

It is clear that the duty to act fairly is concerned only with the manner in which decisions are taken and not whether the decision itself is fair or not.¹⁶⁵ Namibia does not have a statute dealing specifically with administrative justice, so in determining what the duty to act fairly demanded of the public official or body concerned, the Namibian High Court has quoted with approval the elements of procedural fairness as stated in the English case of *Doody v Secretary of State for the Home Department and Other Appeals*:¹⁶⁶ Firstly, where an Act of Parliament confers an administrative power on a functionary, there is a presumption that it will be exercised in a manner which is fair in all the circumstances. Secondly, the standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. Thirdly, the principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all aspects.¹⁶⁷ Fourthly, an essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. Finally, fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

administrative action or the urgency of the matter; and (v) the need to promote an efficient administration and good governance.

¹⁶² Section 3(3)(a) of PAJA.

¹⁶³ Section 3(3)(b) of PAJA.

¹⁶⁴ Section 3(3)(c) of PAJA.

¹⁶⁵ *Viljoen* (note 152) at 240.

¹⁶⁶ *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106d-h.

¹⁶⁷ See *Immigration Selection Board* (note 133) at 174: “This rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion.” See also *Namibia Tourism Board v Tjino Kauapirura-Angula* (unreported judgment delivered on 21 November 2008 and reasons provided on 27 March 2009, case number LCA 48/2007) at par [14].

An important element in ensuring that a fair procedure is followed in considering applications for rights to petroleum, is to require the administrator who has to decide whether to grant or refuse an application to consider applications in the order in which they were received. The MPRD Act recognises the need for this procedural fairness and requires the Regional Manager to consider applications in the order in which they were received.¹⁶⁸ Where applications are received on the same day, they must be treated as being received at the same time, provided that preference must be given to applications from historically disadvantaged persons.¹⁶⁹

In Namibia, the Petroleum Act does not contain a similar provision, despite a similar provision appearing in the Minerals (Prospecting and Mining) Act 33 of 1992.¹⁷⁰ The reason for this is probably because of the way licences were granted when the Petroleum Act came into operation. When the Petroleum Act came into operation, licences were not granted based on an open-licencing system. Instead, licencing rounds were held during which applicants had to apply for licences. In 1999, the system for awarding licences was changed to an open-licencing system.¹⁷¹ It may be argued, however, that based on the elements of fair procedure discussed above, the Minister of Mines and Energy must consider licences in the order in which they were received.

The right to procedural fairness – more specifically the *audi alteram*-principle – is further contained in the Namibian Petroleum Act where this Act deals with application for renewal of exploration and production licences. The Petroleum Act states that the Minister may not refuse to grant an application for the renewal of an exploration or production licence, unless the Minister has given the application written notice of his intention to refuse the application, which notice must set out the reasons for the alleged failure in the application and must require the holder to make representations to the Minister in relation to the alleged failure or to remedy such failure on or before a date specified in such notice.¹⁷² The Minister must take the representations into account before making a final decision.¹⁷³ The same provision,

¹⁶⁸ Section 9(1)(b) read with section 69(2) of the MPRD Act.

¹⁶⁹ Section 9(1)(a) and section 9(2) read with section 69(2) of the MPRD Act.

¹⁷⁰ Section 125 of the Minerals (Prospecting and Mining) Act 33 of 1992.

¹⁷¹ See Chapter Five for more detail.

¹⁷² Section 33(3)(b) and section 47(3) of the Petroleum Act.

¹⁷³ Section 33(3)(b) and section 47(3) of the Petroleum Act.

however, does not apply in respect of an application for the renewal of a reconnaissance licence. The reason why the same provision does not apply to a reconnaissance licence is unclear – it may just be an oversight by the legislature. In the light of the right to procedural fairness, the same should apply to a reconnaissance licence as well.

A similar provision is contained in the Petroleum Act in respect of the cancellation of a licence. The Petroleum Act authorises the Minister to cancel a petroleum licence where the holder fails to comply with the Act or with the conditions of the licence.¹⁷⁴ This power of the Minister is, however, subject to the requirement that the Minister first gives the holder written notification of his intention to cancel the licence. The notice must set out the particulars of the alleged failure and must call upon the holder to make representations to the Minister within a period prescribed in the notice.¹⁷⁵ The Minister must, before cancelling the licence, take into account these representations, as well as any steps taken by the holder to remedy the failure in question or to prevent any such failure from being repeated during the currency of the licence.¹⁷⁶ This provision relating to the cancellation of licences is of particular importance for investors, who would want to know under what circumstances the Minister may cancel a licence and what rights they have in the event of an impending cancellation.

The Petroleum Act does not impose the same obligation on the Minister in respect of a new application for a petroleum licence. The reasoning for this may be that the applicant for a new licence only has an expectation for the licence to be granted, while in the event of a renewal the applicant has vested rights coupled with a legitimate expectation for the rights under the licence to be continued. This does not mean that an applicant for a new licence cannot take the Minister on review if the application for a new licence is not granted – the applicant still has a right to just administrative action, which includes the right to be heard in any administrative decision that will affect the applicant.

¹⁷⁴ Section 19(1) of the Petroleum Act.

¹⁷⁵ Section 19(2)(a) of the Petroleum Act.

¹⁷⁶ Section 19(2)(b) of the Petroleum Act. Where the alleged failure relates to non-payment of any amount payable by the holder, the Minister may not cancel the licence if the holder pays the due amount plus interest before the termination of the period specified in the notice. See section 19(2)(c) of the Petroleum Act.

In respect of an application for a new right under the South African legislation, the MPRD Act requires the designated agency to notify the applicant if the application does not comply with the prescribed requirements, which notification must contain reasons.¹⁷⁷ The MPRD Act does not, however, state that the Minister must give the applicant an opportunity to remedy the application or to make representations. The MPRD Act also does not contain any provisions to this effect in respect of renewals of rights. Nevertheless, the MPRD Act does contain a general provision that requires all decisions to be in writing and to be accompanied by reasons.¹⁷⁸ Dale et al also seem to hold the view (correctly) that there is nothing in the MPRD Act which prevents an applicant from remedying the application and resubmitting it.¹⁷⁹

The MPRD Act, like the Petroleum Act, also authorises the Minister to cancel or suspend a petroleum right or permit if the holder conducts any operations authorised by his right or permit in contravention of Act, breaches any material term of the right or licence, contravenes the approved environmental management programme or has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the Act.¹⁸⁰ Before cancelling a right or permit, however, the Minister must give written notice to the holder of his intention to cancel the licence.¹⁸¹ The written notice must set out the reasons why the Minister intends to cancel or suspend the right or permit and must afford the holder a reasonable opportunity to show why the right or permit must not be cancelled or suspended.¹⁸² The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.¹⁸³ If the holder fails to comply with the direction given by the Minister, the Minister may cancel or suspend the right or permit, but only after having given the holder a reasonable opportunity to make representations and having considered the representations.¹⁸⁴ In the event that the Minister suspended a right or permit, the Minister may lift such suspension if the holder complies with a directions given by the Minister or if the

¹⁷⁷ Section 74(3), section 76(3), section 79(3) and section 83(3) of the MPRD Act.

¹⁷⁸ Section 6(2) of the MPRD Act.

¹⁷⁹ Dale et al (note 73) at MPRDA-212.

¹⁸⁰ Section 90 read with section 47(1) of the MPRD Act.

¹⁸¹ Section 90 read with section 47(2)(a) of the MPRD Act.

¹⁸² Section 90 read with section 47(2)(b) and (c) of the MPRD Act.

¹⁸³ Section 90 read with section 47(3) of the MPRD Act.

¹⁸⁴ Section 90 read with section 47(4) of the MPRD Act.

holder has furnished the Minister with compelling reasons why the suspension should be lifted.¹⁸⁵ Once again, it is important for the holder of a right or permit to know when a right or permit may be cancelled and what rights he has. This also promotes transparency of the regulatory regime for petroleum.

Despite the fact that the MPRD Act and the Petroleum Act fails to give an applicant for a right or licence the opportunity to make representations or remedy an application in all instances, the general principles of just administrative law and specifically fair procedure discussed above, require the Minister or designated agency to give the applicant an opportunity to be heard. The Minister or designated agency is obliged to consider the representations before making a final decision.

2.1.3.5 Duty to Consult

The High Court in South Africa has held that the granting of a prospecting right in respect of minerals results in serious inroads into the property rights of private landowners.¹⁸⁶ The same can be said for mining, exploration and production rights as well. “The consultation process and its result are an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process to determine whether the consultation was sufficient to render the grant of the application procedurally fair.”¹⁸⁷ For this reason, the legislature has provided for due consultations between landowners and holders of rights to minerals and petroleum to alleviate these consequences.¹⁸⁸ So, for example, when the designated agency accepts an application for a reconnaissance permit, exploration right or production right, it must notify the applicant *inter alia* to notify and consult with any affected party.¹⁸⁹ The Act is, however, silent as to whether

¹⁸⁵ Section 90 read with section 47(5) of the MPRD Act.

¹⁸⁶ *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at [13.1].

¹⁸⁷ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at [66].

¹⁸⁸ *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at [13.1].

¹⁸⁹ Section 74(4)(b), section 79(4)(b) and section 83(4)(b) of the MPRD Act. These sections are substituted by section 53(d), section 57(d) and section 61(d) of the MPRD Amendment Act 49 of 2008 respectively. The substituted sections come into force on 7 December 2014. In terms of the substituted subsections, the designated agency must notify the applicant in writing *inter alia* to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998.

or not the results of the consultations must be submitted to the designated agency.¹⁹⁰ It may be argued, however, that in the light of the purpose of consultations, the results of the consultations must be submitted to the designated agency.

In addition to the obligation on the applicant to notify and consult with interested and affected parties, the designated agency must also, within 14 days after accepting an application for a reconnaissance permits or exploration or production right, call upon interested and affected persons to submit their comments regarding the application, which comments must be submitted within 30 days of the date of the notice.¹⁹¹ If a person objects to the granting of a permit or right, the designated agency must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.¹⁹²

Before the MPRD Amendment Act 2008 amended the MPRD Act, the latter provided for a another set of consultations by requiring the holder of a permit or right again to notify and consult with the landowner or lawful occupier of the land in question before conducting reconnaissance operations, exploration operations or production operations or commencing any incidental work.¹⁹³ The MPRD Act, before amendment, therefore effectively envisaged three sets of notification and/or consultations.

The first two sets of consultations are much wider and requires notification to and/or consultations with any “interested” and “affected parties”.¹⁹⁴ The MPRD Act does not define what is meant by “interested” or “affected party”. The Supreme Court of Appeal in South Africa has held, however, that “affected parties” appear to refer to any person whose socio-economic conditions might be directly affected by the operations, which includes for example any person who earns a livelihood in the immediate environment

¹⁹⁰ Compare with section 16(5), which states that an applicant for a prospecting right must submit the results of the consultations to the Regional Manager.

¹⁹¹ Section 69(2)(a) read with section 10(1)(b) of the MPRD Act.

¹⁹² Section 69(2)(a) read with section 10(2) of the MPRD Act.

¹⁹³ Section 5(4)(c) of the MPRD Act, before amendment.

¹⁹⁴ In respect of prospecting rights or mining permits, the MPRD Act requires the applicant to consult with landowners, lawful occupiers or affected parties. See section 16(4)(b) and section 27(5)(b). In respect of mining rights, the MPRD Act requires the applicant to consult with interested and affected parties. See section 22(4)(b).

where the operations are to take place.¹⁹⁵ “Interested parties” on the other hand refers to any person with a lawful interest in the land, such as the owner or lawful occupier.¹⁹⁶ The third set of consultation requires the holder only to consult with the owner or lawful occupier and is thus much narrower than the first set of consultations.

The Constitutional Court in South Africa has stated that the various different requirements of notification and consultations are indicative of “a serious concern for the rights and interests of landowners and lawful occupiers”.¹⁹⁷ After the amendment, however, the MPRD Act has done away with the third set of consultations. Now, once an applicant has been awarded a permit or right, he may not conduct any reconnaissance operations, explorations operations or production operations or commence with any work incidental thereto on any area without giving the landowner or lawful occupier in question at least 21 days’ written notice.¹⁹⁸ The first set of consultations – those by an applicant with affected parties – and the second set – notification to interested and affected parties – remain in place.

In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*, the Constitutional Court held that one of the purpose of consultations with the landowner “must surely be to see whether some accommodation is possible between the applicant for a [right to minerals or petroleum] and the landowner insofar as the interference with the landowner’s rights to use the property is concerned.”¹⁹⁹ The purpose of the consultations is further to provide landowners or occupiers with the necessary relevant information on everything that is to be done on the property so that the landowners can make an informed decision in relation to the representations to be made, whether to use internal appeal procedures or whether to take the administrative action on review.²⁰⁰

Given the purpose of consultations, the Constitutional Court in *Bengwenyama* set out various criteria with which the first consultation process (consultation by the applicant

¹⁹⁵ *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd and Others* [2011] 4 All SA 168 (SCA) at [31].

¹⁹⁶ *SA Soutwerke / Saamwerk Soutwerke* (note 195) at [30].

¹⁹⁷ *Bengwenyama Minerals / Genorah* (note 187) at [63].

¹⁹⁸ Section 5A(c) of the MPRD Act.

¹⁹⁹ *Bengwenyama Minerals / Genorah* (note 187) at [65].

²⁰⁰ *Bengwenyama Minerals / Genorah* (note 187) at [66].

with affected parties) must comply. These criteria apply to rights to petroleum as well. First, the applicant must inform the landowner in writing that his application for a permit or right which affects the owner's land has been accepted for consideration by the designated agency. Secondly, the applicant must inform the landowner in sufficient detail of what the operations on the land will entail, for the landowner to assess what impact the operations will have on the landowner's use of the land. Thirdly, the applicant must consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed operations. Finally, the applicant must submit the results of the consultation process to the designated agency.²⁰¹

In Namibia, there is no express obligations to consult with landowners on either an applicant for or holder of a right in respect of petroleum. It merely requires the holder of a petroleum licence to give the owner or occupier of the land affected by the licence prior written notice before commencing any operations.²⁰² Similarly, under the Namibian Minerals (Prospecting and Mining) Act 33 of 1992, there is also no duty to consult with landowners. However, the holder of a prospecting or mining licence may not exercise any rights in terms of its licence before entering into an agreement with the landowner setting out provisions relating to access and compensation.²⁰³ No similar provision exists in the Petroleum Act, although there are indications that the legislature may have intended the holder to enter into some form of arrangement with the owner. For example, the Petroleum Act states that where it is reasonably necessary for the holder of a production right to enter onto private land to carry out any lawful operations or other authorised activities but the holder is prevented from doing so by the owner, the holder may apply to the Petroleum Ancillary Rights Commission for access. The same applies if the owner makes unreasonable demands in exchange for access.²⁰⁴ The Commission must then inquire into the matter.²⁰⁵ Any person whose rights may be affected by a decision by the Commission is entitled to be heard at a hearing of the

²⁰¹ *Bengwenyama Minerals / Genorah* (note 187) at [67].

²⁰² Section 60(2) of the Petroleum Act.

²⁰³ Section 52(1)(a)(i) of the Minerals (Prospecting and Mining) Act 33 of 1992.

²⁰⁴ Section 56(1) of the Petroleum Act.

²⁰⁵ Section 57(1) of the Petroleum Act.

Commission.²⁰⁶ If the parties cannot agree on compensation to be paid to the owner, the Commission may determine compensation.²⁰⁷

Under the Petroleum Act, therefore, there is a very limited scope where interested parties are heard – only when there is a dispute between the holder and landowner in respect of access. Nevertheless, no petroleum licence may be issued before the holder obtains an ECC. Part of the application for an ECC requires consultation with interested and affected parties. This is discussed in more detail in Chapter 6.

2.1.3.7 Right of Access to Information

Access to information is key in just administration,²⁰⁸ and “is one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability.”²⁰⁹ As a central element of transparency, it may also curb corruption,²¹⁰ which is discussed in more detail later in the chapter. Disclosure of information held by the government is also believed to enhance citizen confidence in government as it promotes government accountability towards its citizens.²¹¹

Access to information is particularly important for the petroleum industry of South Africa. Because of the historic economic sanctions in South Africa, its petroleum industry was shrouded in secrecy.²¹² This situation was maintained by the fact that the state traditionally reserved the entitlements to petroleum for itself, with the state

²⁰⁶ Section 57(2) of the Petroleum Act.

²⁰⁷ Section 59(1) of the Petroleum Act.

²⁰⁸ See for example Baxter (note 76) at 233, where the learned author states that “[s]ecrecy is an undoubted cause of maladministration...”.

²⁰⁹ Hoexter (note 59) at 94.

²¹⁰ Stiglitz J “What Is the Role of the State?” in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at 26.

²¹¹ Maina H “*Disclosure vs Secrecy: What is the Right Balance*” Briefing Paper: Access to Information as a Tool for Socio-Economic Justice [available at <http://www.ippr.org.na/sites/default/files/ATI%20Disclosure%20v%20Secrecy%20Briefing%20Paper.pdf>, accessed 11 April 2015] at 1.

²¹² Cawood F “Can South Africa Improve its National Petroleum Strategy?” (2008) Research Paper presented as part of LLM, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee at 3.

petroleum company (PetroSA) mainly producing petroleum and allowing very few companies to compete with it.²¹³

The right to be given reasons for administrative decisions has already been discussed above as part of procedural fairness. This right, however, only vests in the person in respect of whom a decision is made. To promote transparency, a wider right of access to information needs to be recognised.

Before the South African Constitution came into operation, there was general support for maintaining secrecy in government.²¹⁴ Now, the South African Constitutes recognises that everyone has a right of access to information held by the state and any information held by any other person that is required for the exercise or protection of any rights.²¹⁵ The South African Constitution therefore guarantees transparency through the free flow of information.²¹⁶ As with the right to just administrative action, national legislation must be enacted to give effect to the right of access to information.²¹⁷ To this effect, the legislature passed the Promotion of Access to Information Act (“**PAIA**”).²¹⁸

The Preamble of PAIA recognises that, before 27 April 2004, the system of government in South Africa resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations.²¹⁹ The purpose of PAIA is foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.²²⁰ The emphasis of PAIA is on access to information rather than data protection or privacy.²²¹

PAIA applies to any “record”, which is defined as any recorded information, regardless of form or medium, which is in the possession or under the control of a public or

²¹³ Cawood F “Allocation of Petroleum Development Rights in South Africa: A Comparison with Current International Practices” (2006) Research Paper presented as part of LLM, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee at 3.

²¹⁴ Hoexter (note 59) at 95.

²¹⁵ Section 32(1) of the South African Constitution.

²¹⁶ Hughes (note 66) 4.

²¹⁷ Section 32(2) of the South African Constitution. The legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state.

²¹⁸ Promotion of Access to Information Act 2 of 2000 (“**PAIA**”).

²¹⁹ Preamble to the PAIA.

²²⁰ Preamble to the PAIA.

²²¹ Hoexter (note 59) at 96.

private body and irrespective of whether it was created by that body.²²² When the record came into existence is irrelevant.²²³ It does not, however, apply to records requested for criminal or civil proceedings after commencement of the proceedings.²²⁴ For this, the normal rules of discovery in procedural law still apply.²²⁵

Part 2 of PAIA deals with access to records of public bodies. Any person requesting information from a public body must be given access to that information if the requester complies with the procedural requirements of PAIA and access to that record is not refused in terms of any ground for refusal contemplated in PAIA.²²⁶ A “public body” means any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government.²²⁷ It also includes any other functionary or institution when exercising a power or performing a duty in terms of the Constitution or a provincial constitution or exercising a public power of performing a public function in terms of any legislation.²²⁸ Records from certain public bodies or officials are excluded from the provisions of the PAIA.²²⁹

Part 3 of PAIA deals with access to records of private bodies. Any person requesting information from a private body must be given access to the record if that record is required for the exercise or protection of any rights, the requester complies with the formal procedural requirements in terms of PAIA and access to that record is not refused in terms of any of the grounds of refusal contemplated in PAIA.²³⁰

PAIA is an important step towards transparency and ultimately accountability. The right of access to information, however, is facing a serious challenge in the form of the

²²² Section 1 of the PAIA; Hoexter (note 59) at 97.

²²³ Section 3 of the PAIA; Hoexter (note 59) at 97.

²²⁴ Section 7(1) of the PAIA.

²²⁵ Hoexter (note 59) at 97.

²²⁶ Section 11(1) of the PAIA.

²²⁷ Section 1 of the PAIA.

²²⁸ Section 1 of the PAIA.

²²⁹ Section 12 of the PAIA. This includes records of the Cabinet and its committees, records relating to the judicial functions of a court referred to in section 166 of the Constitution, a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 or a judicial officer of such court or Special Tribunal. It also includes records of an individual member of Parliament or of a provincial legislature in that capacity or relating to a decision regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.

²³⁰ Section 50(1) of the PAIA.

Protection of State Information Bill,²³¹ colloquially referred to as the “Secrecy Bill”. This Bill *inter alia* confers upon organs of state very wide powers to classify and to withhold information on security grounds.²³² In its current form, the Bill is “hopelessly flawed and unlikely to pass constitutional scrutiny.”²³³

The MPRD Act also deals with disclosure of information. Any information or data submitted by holders of reconnaissance permits, exploration rights and production rights to the designated agency may be disclosed to any person to promote certain goals of the MPRD Act. These goals pertain to the promotion of equitable access to petroleum resources. Their purpose is to expand substantially and meaningfully opportunities for historically disadvantaged persons to enter into and actively participate in the petroleum industry. The purpose of these goals is further allow historically disadvantaged persons to benefit from the exploitation of the petroleum resources of South Africa and to promote economic growth and petroleum resources development in South Africa.²³⁴ The information may also be disclosed to any person to give effect to the constitutional right of access to information.²³⁵ If the information is already publicly available, it may also be disclosed to any person.²³⁶ Finally, the information may also be disclosed to any person once the relevant right or permit has lapsed or been cancelled or the area to which the right or permit relates has been abandoned or relinquished.²³⁷ Any information or data supplied in confidence may not be disclosed.²³⁸

Unlike the South African Constitution, the Namibian Constitution contains no right to access of information. There is also no act dealing with access to information. In this respect, Namibia is far behind South Africa when it comes to transparency. For example, the former Apartheid-era’s Protection of Information Act 84 of 1982 is still

²³¹ Protection of State Information Bill, B6-2010. See Hoexter (note 59) at 102.

²³² Hoexter (note 59) at 102.

²³³ Hoexter (note 59) at 102.

²³⁴ Section 30(1)(a) read with section 69(2) and section 2(c)–(e) of the MPRD Act.

²³⁵ Section 30(1)(b) read with section 69(2) of the MPRD Act.

²³⁶ Section 30(1)(c) read with section 69(2) of the MPRD Act.

²³⁷ Section 30(1)(d) read with section 69(2) of the MPRD Act.

²³⁸ Section 30(2) read with section 69(2) of the MPRD Act.

applicable in Namibia. This Act seeks to promote the protection of state information in respect of prohibited places.²³⁹

Contrary to the access of information provided for in the MPRD Act, the Petroleum Act promotes secrecy.²⁴⁰ The Commissioner, the Chief Inspector and any other officer employed in the Ministry of Mines and Energy, whether or not involved in carrying out the provisions of the Petroleum Act, must preserve and aid in preserving secrecy in relation to all matters that may come to his knowledge in the exercise of his powers or the performance of his duties and functions in connection with those provisions.²⁴¹ He may not communicate any such matter to any other person or permit any person to have access to any documents in his possession or custody, except in so far as any such communication is required by or may be made under the Petroleum Act or any other law or by order of a competent court.²⁴² Failure to comply with this provision is a criminal offence.²⁴³

Notwithstanding the above, there are few measures still available to gain access to information. Firstly, when an administrative decision is taken on review, it is done in terms of Rule 53 of the Uniform Rules of the High Court of South Africa and Rule 76 of the Namibian High Court Rules. A review application is brought by way of Notice of Motion, which must call on the administrator to despatch, within 15 days after receipt of the Notice of Motion, to the Registrar of the High Court the record of the proceedings sought to be corrected or set aside.²⁴⁴ It must be accompanied by reasons

²³⁹ A “prohibited place” is defined in section 1 of the Protection of Information Act 84 of 1982 as “(a) any work of defence belonging to or occupied or used by or on behalf of the Government, including-(i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft; (ii) any telegraph, telephone, radio or signal station or office; and (iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto; (b) any place where armaments or any model or document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the Government of the government or of any foreign State; (c) any place or area declared under section 14 to be a prohibited place”.

²⁴⁰ Hopwood G *Namibia’s New Frontiers: Transparency and Accountability in Extractive Industry Exploration* (2013) Windhoek Institute for Public Policy Research at 5, where the author states that “...there are aspects of Namibia’s management of its oil, gas, and mineral resources that are at best opaque and at worst highly secretive.”

²⁴¹ Section 5(1) of the Petroleum Act.

²⁴² Section 5(1) of the Petroleum Act.

²⁴³ Section 5(2) of the Petroleum Act.

²⁴⁴ Rule 53(1)(b) of the Uniform Rules of the High Court of South Africa and Rule 76(2)(b) of the Namibian High Court Rules.

for the decision.²⁴⁵ The administrator must make available all information on which his decision was based. Furthermore, the rules of discovery in criminal and civil proceedings also apply.²⁴⁶ The right to discovery in review proceedings only arise, however, once review proceedings have been instituted, which proceedings are often expensive and time-consuming. Furthermore, a review may only be instituted by a party with the required *locus standi*, so this right of discovery is only afforded to an applicant with the necessary standing, and not the broader public or citizenry of a country.

Disclosure of information relating to petroleum revenue specifically is “central to the discourse of transparency in revenue management.”²⁴⁷ Mismanagement of extractive revenues, coupled with corruption, is becoming an obstinate social problem that many developing countries are confronting.²⁴⁸ Transparency in revenue management can be facilitated by disclosing basic information on the revenue distribution from petroleum resources and making this information public.²⁴⁹ Ensuring that information about extractive industry revenues is released will enable all stakeholders to monitor and ensure that people benefit from petroleum resources.²⁵⁰ While South Africa and Namibia do not expressly require disclosure of petroleum revenue, they generally have open budgets compared to international standard, as discussed in Chapter Seven above.

2.1.3.6 Administrative Appeal and Judicial Review

Under common law, the right to seek judicial review may be suspended or deferred until the applicant has exhausted internal remedies which may have been created by the legislature.²⁵¹ This, however, depended on whether or not the statute intended internal remedies to be exhausted before approaching a court.²⁵²

²⁴⁵ Rule 53(1)(b) of the Uniform Rules of the High Court of South Africa and Rule 76(2)(b) of the Namibian High Court Rules.

²⁴⁶ See for example *S v Angula and Others*; *S v Lucas* 1996 NR 323 (HC).

²⁴⁷ Al Faruque A “Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices” (2006) *Journal of Energy and Natural Resources Law* 66 at 86.

²⁴⁸ Al Faruque (note 247) at 66.

²⁴⁹ Al Faruque (note 247) at 68.

²⁵⁰ Hopwood (note 240) at 6.

²⁵¹ Baxter (note 76) at 720. See for example *Shames v South African Railways and Harbours* 1922 AD 228 at 235–236, where the Appellate Division stated as follows: “But the question still remains at what stage of the proceedings is it competent for an aggrieved servant to have recourse

On the other hand, the existence of special statutory remedies under common law has sometimes been regarded as replacing or excluding the common-law remedy of review.²⁵³ The possibility of special statutory remedies “ousting” the jurisdiction of the courts may under modern South African and Namibian law not pass constitutional muster, especially in the light of the fact that the right to just administrative action is entrenched as a fundamental right in both countries.²⁵⁴

Both the Constitutional Court in South Africa and the Supreme Court in Namibia support the common-law view that internal remedies may defer or suspend the right to seek judicial redress, depending on how the relevant statute is constructed.²⁵⁵ Sometimes a statute expressly requires that internal remedies be exhausted before approaching a court. It is, however, more common that the statute does not expressly require an applicant to exhaust internal remedies before approaching a court and one therefore has to determine whether it implicitly requires exhaustion of internal remedies.²⁵⁶

Even if a statute provides for internal remedies, it is not to say that the statute requires that these remedies must be exhausted before redress is had to court.²⁵⁷ For example, an applicant cannot be expected first to exhaust internal remedies where these remedies would not be effective or whether their pursuit would be futile.²⁵⁸ This is also the case where the appeal tribunal has developed a rigid policy which renders exhaustion of internal remedies futile.²⁵⁹ PAJA supports this view and states that internal remedies must first be exhausted, unless under exceptional circumstances and on application by

to a court of law. Is he entitled to do so at the initial stage, so soon as a penalty has been inflicted upon him, or only at the final stage when he has exhausted all the remedies which under the Act are open to him? This is a question which has not been dealt with in any of the decided cases, so far as I am aware, but I am clearly of opinion that it is only if the irregularity or illegality has been persisted in up to the final stage that it is competent to the servant to take legal proceedings.”

²⁵² Baxter (note 76) at 720.

²⁵³ Hoexter (note 59) at 581. See for example *Shames* (note 251) at 233–234.

²⁵⁴ See also Hoexter (note 59) at 582.

²⁵⁵ See *Koyobe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at [38] and *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated* 2012 (1) NR 69 (SC) at [43]–[66].

²⁵⁶ *Namibian Competition Commission* (note 255) at [45].

²⁵⁷ *Namibian Competition Commission* (note 255) at [45]; *Koyobe* (note 255) at [38].

²⁵⁸ *Namibian Competition Commission* (note 255) at [47]; *Koyobe* (note 255) at [39].

²⁵⁹ *Koyobe* (note 255) at [39].

the person concerned such person is exempted from the obligation to exhaust internal remedies if the court deems it to be in the interest of justice.²⁶⁰

The MPRD Act provides for internal appeal process. It states that any person whose right or legitimate expectations have been materially or adversely affected or who is aggrieved by any administrative action under the MPRD Act, may take the decision on appeal within 30 days of becoming aware of the decision.²⁶¹ The appeal must be lodged in the prescribed manner.²⁶² Where a decision was taken by a Regional Manager or any person to whom the power has been delegated or a duty has been assigned to under the MPRD Act, the decision must be taken on appeal to the Director-General.²⁶³ Where a decision was taken by the Director-General or the designated agency, the decision must be taken on appeal to the Minister of Mineral Resources.²⁶⁴ A decision taken on appeal is not suspended unless the Director-General or Minister suspends the decision and any subsequent application under the MPRD Act must be suspended pending finalisation of the appeal.²⁶⁵

The seemingly clear position on internal appeals depends, however, becomes slightly more complicated where the Regional Manager or Director-General takes a decision on delegated authority. Here, the question whether the authority was delegated by a decentralisation or deconcentration of public power comes into play again. For example, in *Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy and Others*²⁶⁶ the Director-General took an administrative decision based on authority delegated to through a deconcentration of public power. The decision was therefore taken by the Director-General on behalf of the Minister and the court found that no internal appeal was possible as the decision was considered to be a decision of the Minister.²⁶⁷

²⁶⁰ Section 7(2) of PAJA.

²⁶¹ Section 96(1) of the MPRD Act.

²⁶² Section 96(1) of the MPRD Act. Regulation 74 of the MPRD Regulations deals with the manner of lodging appeals.

²⁶³ Section 96(1)(a) of the MPRD Act.

²⁶⁴ Section 96(1)(b) of the MPRD Act.

²⁶⁵ Section 96(2) of the MPRD Act.

²⁶⁶ *Global Pact / Minister of Minerals and Energy* (note 92).

²⁶⁷ *Global Pact / Minister of Minerals and Energy* (note 92) at [8].

The MPRD Act explicitly requires that the internal appeal process be followed before a person applies to court for the review of the administrative action.²⁶⁸ As we have seen above, the South African courts will defer or suspend an application for review of an administrative decision under the MPRD Act until the internal remedies have been exhausted. Under exceptional circumstances, and in terms of PAJA, an applicant may be allowed to proceed with a review application before exhausting his internal remedies under the MPRD Act.

The Petroleum Act in Namibia also provides for internal remedies. So, for example, the Petroleum Act provides for the general powers of the Commissioner and Chief-Inspector with regard to inspections, investigations, inquiries, searches and seizures.²⁶⁹ Any person who feels aggrieved by a direction, order or restriction issued to or imposed upon him by the Commissioner, Chief-Inspector or any officer engaged in carrying out these powers may appeal in writing, in the case of a direction, order or restriction issued or imposed by the Commissioner or the Chief Inspector, to the Minister of Mines and Energy or, in the case of any other direction, order or restriction, to the Commissioner against such direction, order or restriction.²⁷⁰ The Minister or Commissioner, whatever the case may be, must as soon as practicable hear and dispose of the appeal.²⁷¹ A decision by the Minister or Commissioner on an appeal is final.²⁷² The direction, order or restriction in question is not suspended pending finalisation of the appeal.²⁷³

Further to the above, the Petroleum Act also contains a general right of appeal.²⁷⁴ Any person who feels aggrieved by a decision of the Commission has the right to appeal to the High Court of Namibia, which appeal is to be treated similar to an appeal from the magistrates' court.²⁷⁵ This clause does not apply to appeal decisions taken by the Commissioner, as the Petroleum Act clearly states that these decisions are final. This clause, however, applies to all other decisions of the Commissioner.

²⁶⁸ Section 96(3) of the MPRD Act.

²⁶⁹ Section 4 of the Petroleum Act.

²⁷⁰ Section 4(3)(a) of the Petroleum Act.

²⁷¹ Section 4(3)(a) of the Petroleum Act.

²⁷² Section 4(3)(a) of the Petroleum Act.

²⁷³ Section 4(3)(b) of the Petroleum Act.

²⁷⁴ Section 61 of the Petroleum Act.

²⁷⁵ Section 61 of the Petroleum Act.

The right of a person to take an appeal decision of the Commissioner or Minister on review to the High Court is ousted by the Petroleum Act, which states that this decision will be final. It is doubtful, however, whether this clause is constitutional in the light of the constitutional right to just administrative action. The constitutionality of this section has, however, not been tested by the courts in Namibia.

Aside from the above, the right to approach a court on judicial review is not excluded, nor is there any indication in the Petroleum Act that internal remedies must first be exhausted. In cases of decisions by the Commissioner, courts may require an applicant first to exhaust the internal right of appeal, provided that this will be an effective remedy. For decisions by the Minister, there are no internal remedies.

2.1.4 Assessment of the Right to Just Administrative Action

All persons have the right to petroleum being administered lawfully, reasonably and procedurally fair. This is guaranteed by the Constitutions of both South Africa and Namibia. South Africa has gone one step further and enacted legislation specifically dealing with the enforcement of the common-law and constitutional right of just administrative action.

When the state, through its designated agents and officers, administers petroleum resources, it is performing administrative functions and its actions must be lawful. Administrators must be properly authorised to deal with and make decisions in respect of petroleum. This is particularly important where the administrator taking the decision has delegated authority to act. The administrator must also have the proper jurisdiction to make decisions in respect of petroleum. While the administrators often have discretion to make decisions in respect of petroleum, this discretion must be exercised within the confines of the right to just administrative action. Any administrator who fails to do so while acting contrary to the principles of just administrative action and a person affected by the decision may apply to court for the necessary relief. Therefore, by requiring a functionary to act lawfully, the framework for just administrative action ensures accountability should the functionary fail to do so.

Lawfulness aside, the decisions taken in respect of petroleum must be reasonable. This means firstly that there must be a rational connection between the action itself and the

purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator. For this reason, persons affected by the decision are entitled to be given reasons by the administrator for the decision. The right to be given reasons not only promotes transparency by divulging the reasons for which a decision was taken, but also promotes accountability. By forcing an administrator to give reasons for his decision and making it possible to take the administrator on review if he fails to do so or if the reasons reflect unreasonableness, the administration is held accountable for its action. Lawfulness also requires proportionality, which means that a balance must be struck between the adverse and beneficial effects of administrative action and to encourage the administrator to consider the need for the action and the possibility of using less drastic or oppressive means to achieve the desired end.

The final element of just administrative action is procedural fairness. It requires administrators *inter alia* to grant persons affected by a decision to make representations. Procedural fairness also requires administrators to be impartial and act in good faith in making their decisions. Procedural fairness therefore ensures that interests of persons affected by an administrative decision is protected. By establishing fundamental principles of a fair procedure, transparency in the administration of petroleum is ensured. Furthermore, failure to adhere to fair procedure renders an administrative decision subject to review, thus ensuring accountability.

The limitations placed on the state in terms of just administrative action and access to information operate within clearly set parameters, and hence are, in themselves, restricted. Often the functioning of these limits depend on actions expected to be taken by those parties in whose interests they function. For instance, before approaching a court for review, an aggrieved person is advised (and under some circumstances required) to exhaust all available internal remedies, depending on how the statutory provisions are formulated. The MPRD Act explicitly requires a person affected by a decision taken in terms of the Act to use internal remedies before approaching a court. The Petroleum Act does not contain similar provisions.

Another example may be taken from recent developments around the right of access to information in South Africa. As illustrated, this right is important in ensuring

transparency and accountability in the regulatory framework for petroleum resources and increases the presence of these elements greatly within the petroleum industry.²⁷⁶ In South Africa, this right is entrenched in the Constitution and legislation in the form of PAIA has been passed to give effect to this right. While this has been an important step towards ensuring transparency and accountability, this right is under threat in the form of the Secrecy Bill.²⁷⁷

In Namibia, there is no explicit right of access to information. In fact, the regulatory framework for petroleum resources in Namibia seems to promote secrecy rather than transparency. There are few instances where a person may establish and exercise a right of access to information, for example through discovery procedures. What is clear, however, is that more is required to ensure a right of access to information.

The right of just administrative action and the right of access to information not only give content to regulatory framework for petroleum resources, but go further to ensure greater transparency and accountability. However, the civil remedies provided by the right to administrative justice and the right to information cannot by themselves promote transparency and accountability. Corrupt practices, which are prevalent in the petroleum industry, need to be combated and punished as well. The sudden (and sometimes short-lived) financial success resulting from an oil find increases the opportunity for corruption in the host government, where officials could use this opportunity and their control over the flow of funds to keep themselves in power.²⁷⁸ Corruption related to natural resources, particularly oil and gas, takes many forms, including bribery of officials in charge of controlling petroleum resources to obtain access to petroleum or to purchase petroleum at below market-related prices.²⁷⁹ The analysis above has shown that corruption needs to be addressed. Both South Africa and Namibia criminalises corrupt practices. But merely prohibiting it is not enough. Measures must also be put in place to combat corruption actively, thereby promoting transparency and accountability. In Namibia, the Anti-Corruption Commission has shown some success in combating corruption and educating the public on corruption.

²⁷⁶ Hughes (note 66) at 4.

²⁷⁷ See paragraph 3 above.

²⁷⁸ Humphreys, Sachs and Stiglitz (note 4) at 10–11.

²⁷⁹ Humphreys, Sachs and Stiglitz (note 4) at 11.

No similar body is established in South Africa, but there are indications that government is looking at reintroducing such a body. Furthermore, private organisations have taken it on themselves to follow and report on corruption in both South Africa and Namibia, which goes great lengths in promoting transparency and accountability.²⁸⁰

The right to just administrative action, including the right to access to information, ensures that the regulatory framework for petroleum resources is transparent and that the state is held accountable to its citizens and to stakeholders in the industry. A proper framework for just administrative goes a long way to ensure that the petroleum industry operates on a transparent basis in that all affected parties have recourse in the event of maladministration of these resources.

The South African and Namibian regulatory regimes have reached a point where a proper administrative framework promoting just administrative action is in place. Petroleum companies and affected persons can call upon the principles of just administrative action to enforce their rights and ensure that petroleum resources are administered properly.

There is, however, room for improvement. The current situation in Namibia insofar as it relates to access to information is untenable and not conducive towards a transparent and accountable regulatory regime for petroleum exploitation.²⁸¹ The same applies to the lack of regulation of extractive revenue in both South Africa and Namibia.²⁸² These two countries may do well to learn from their African counterpart, Ghana, who adopted the Petroleum Revenue Management Act of 2011, which ensures that petroleum revenue is made available to finance the development of other sectors, such as agriculture health and education.²⁸³

2.2 Control over Corruption

The right to just administrative action and the right of access to information go far to promote transparency and accountability in the regulation of petroleum. However,

²⁸⁰ See paragraph 4.4 above.

²⁸¹ Hopwood (note 240) at 6 – 7.

²⁸² See also Cameron P “Drafting Oil and Gas Laws: Current Issues” September 2014 *Oil and Gas Law Newsletter* 8 at 9.

²⁸³ See the Petroleum Revenue Management Act of 2011 (Act 815) of Ghana. See also Hopwood (note 240) at 22.

corrupt practices are at the core of underdevelopment²⁸⁴ and have become a major issue in the petroleum industry and one of the greatest threats to accountability and transparency in the sector. Post-colonial Africa is one of the hardest-hit victims of corruption.²⁸⁵ Corruption is a reality in South Africa and Namibia. According to the Corruption Perceptions Index 2012 (the CPI 2012), published by Transparency International, South Africa ranked 69th and Namibia 58th on the corruption scale, with respective scores of 43 and 48.²⁸⁶

Corruption is a “complex phenomenon” and often the consequence of more deep-rooted problems of policy distortion, institutional incentives and governance.²⁸⁷ The High Court in South Africa, quoted in the Supreme Court of Appeal,²⁸⁸ has in no uncertain terms stated quite clearly what its view on corruption is and has likened it to a cancer “eating away remorselessly at the fabric of corporate probity and extending its baleful effect into all aspects of administrative functions, whether State official or private-sector manager.”²⁸⁹

Merely criminalising or prohibiting corrupt practices is not sufficient; effective efforts to combat corruption must be put in place.²⁹⁰ Also, there must be better understanding of the underlying causes of the corruption.²⁹¹

²⁸⁴ Wokoro JNE “Beyond Petroleum Production to Community Development: International Oil Companies as Proxy Governments” 2009-2010 (5) *Texas Journal of Oil, Gas and Energy Law* 323 at 344; Al Faruque (note 247) at 66.

²⁸⁵ Van der Walt B “Corruption: A Many-headed Monster” 2001 (66) *Koers* 691 at 691, where the author also states that “[d]espite great assets, Africa makes slow progress because of the slow bleeding of the festering wound of corruption.”

²⁸⁶ With zero being highly corrupt and 100 being very clean. See Transparency International “Corruption Perceptions Index” available at <http://cpi.transparency.org/cpi2012/results> [accessed 02.02.2014].

²⁸⁷ Schloss M “Combating Corruption - Moving from Words to Deeds” 2003 (I) *Oil, Gas and Energy Law Intelligence* 2 at 2.

²⁸⁸ *S v Shaik and Others* 2007 (1) SACR 247 (SCA) at [50].

²⁸⁹ *S v Shaik and Others* 2007 (1) SACR 142 (D) at 239. The Court continued as follows: “If it is not checked, it becomes systemic and the after-effects of systemic corruption can quite readily extend to the corrosion of any confidence in the integrity of anyone who has a duty to discharge, especially a duty to discharge to the public, leading eventually, and unavoidably, to a disaffected populace. One can, hopefully, discount the prospect of it happening in this country. But it is that sort of increasing disaffection which leads, and has led in other parts of our continent and elsewhere, to *coups d'état* or the rise of Populist leaders who, in turn, manipulate politics for even greater private benefit.”

²⁹⁰ Schloss (note 287) at 2.

²⁹¹ Schloss (note 287) at 3.

A culture of openness and accountability will not develop on its own, but needs to be underpinned by appropriate legislative measures.²⁹² To ensure transparency and accountability, the regulatory framework for petroleum resources needs to address corruption. However, corruption also has a significant effect on the contribution that the petroleum industry to the broader economy, since the misallocation of government resources and efforts is the unavoidable result of corruption.²⁹³ It is therefore important that a general regulatory framework combating and punishing corruption is in place. Proper control over corruption is vital in ensuring that the people benefit from the exploitation of petroleum resources. But it is not only necessary to criminalise corrupt practices. Measures must also be put in place to ensure that corruption, and attempts at corruption, are combatted and punished.

2.2.1 The Framework for Corruption Control

Modern South African and Namibian legislation punish corrupt practices, which is much wider than and includes bribery. In South Africa, corrupt activities are regulated by the Prevention and Combating of Corrupt Activities Act 12 of 2004 (“**Corrupt Activities Act**”). This Act repeals the Corruption Act 94 of 1992. Before the 1992-Act, however, corruption was dealt with in terms of the Prevention of Corruption Act of 1918 and the Prevention of Corruption Act of 1958, which existed alongside the common-law relating to bribery²⁹⁴ and corruption.²⁹⁵ The Corrupt Activities Act is a

²⁹² Hopwood (note 240) at 6.

²⁹³ Lokanc M *The Extractive Industries as a Primer for Economic Growth – Getting Around the Resource Curse* (unpublished MSc-thesis, University of the Witwatersrand, 2008) at 79.

²⁹⁴ Nathan M *The Common Law of South Africa* Volume 4 (1907) Grahamstown African Book Company, Limited at 2464 defines bribery as follows: “All persons who give or promise anything by way of gifts, presents or rewards to officers of Government, Judges and officers of the superior and inferior Courts of justice, to magistrates, or to the wives, children or other near relatives of such officers, Judges, or magistrates, with the intent to induce such officers, Judges or magistrates to perform any act or to abstain from doing any act, or otherwise to influence them in their official or judicial capacity, or with the intent to obtain any office, whether for the benefit of the person giving or promising the same or for other reasons, are guilty of bribery.” See however *Rex v Vaunson* 1919 TPD 16 at 18 where the court found that a gift to the daughter of a public official did not amount to bribery. The court did acknowledge, however, that this may open the door “to something rather allied to bribery”, but that this is a matter for the Legislature and not for the courts.

²⁹⁵ The common-law crime of bribery is committed by both the person tending the advantage and the person accepting the advantage. Nathan (note 294) at 2464. *S v Benson Aaron* 1893 H 125 at 129 to 131 and the authorities cited there. Bribery as a form of corrupt practices was punishable under Roman and Roman-Dutch law. The basic principles of bribery as applied in Roman law and developed under Roman-Dutch law were received in South Africa and Namibia as well. The common-law crime of bribery as applied in South Africa and Namibia may be defined as “the

drastic (and by some described as draconic) deviation from the previous statutes.²⁹⁶ It provides for the strengthening of measures to prevent and combat corruption and corrupt activities.²⁹⁷

The Anti-Corruption Act 8 of 2003 (“**Anti-Corruption Act**”) in Namibia intends to provide for the prevention and punishment of corruption in Namibia.²⁹⁸ This Act provides for the prevention and punishment of corruption.²⁹⁹ It repeals the Prevention of Corruption Ordinance 2 of 1928 and the Prevention of Corruption Amendment Act 21 of 1985.

Both the Corrupt Activities Act in South Africa and the Anti-Corruption Act in Namibia create a general offence of corruption.³⁰⁰ This offence is generally committed by any person who directly or indirectly and corruptly³⁰¹ receives or agrees to receive any gratification as an inducement or reward for doing or omitting to do anything. The

practice of tendering (and accepting) a private advantage as a reward for the performance of a duty.” Burchell J and Milton J *Principles of Criminal Law* 3 ed (2005) Lansdowne Juta and Company Ltd at 889.

²⁹⁶ Lambrechts D, "The Prevention and Combating of Corrupt Activities Act as an Investigative Instrument Pertaining to Bribery and Corruption" 2004 (17) *Acta Criminologica* 106 at 117.

²⁹⁷ See the long title to the Corrupt Activities Act.

²⁹⁸ Long title to the Anti-Corruption Act.

²⁹⁹ Long title to the Anti-Corruption Act.

³⁰⁰ Section 3 of the Anti-Corruption Act and section 3 of the Corrupt Activities Act. This section reads as follows: “Any person who, directly or indirectly (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, to act, personally or by influencing another person so to act, in a manner (i) that amounts to the (aa) illegal, dishonest, unauthorised, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules, (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”

³⁰¹ In terms of section 3 of the Corrupt Activities Act, it activity amounts to corruption if the person receives the gratification as an inducement to act in a manner (i) that amounts to the (aa) illegal, dishonest, unauthorised, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules, (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything. Section 32 of the Anti-Corruption Act defines “corruptly” as “in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to (a) any employment relationship; (b) any agreement; or (c) the performance of any function in whatever capacity”.

offence is also committed by the person corruptly giving or agreeing to give the gratification.³⁰² The ambit of the general crime of corruption in both countries is very wide and includes attempts at corruption as well. It is also not limited to dealings with public officials only, but includes commercial corruption as well.³⁰³

Both the Corrupt Activities Act and the Anti-Corruption Act create specific crimes of corruption as well. These crimes follow the basic structure of the general offence of corruption. Specific crimes are created in respect of particular persons.³⁰⁴ In South Africa, these persons are public officers,³⁰⁵ foreign public officials,³⁰⁶ agents,³⁰⁷ members of the legislative authority,³⁰⁸ judicial officers,³⁰⁹ members of the prosecuting authority,³¹⁰ parties to an employment relationship³¹¹ and witnesses and evidential material during certain proceedings.³¹² In Namibia, these persons are agents,³¹³ public officers,³¹⁴ witnesses³¹⁵ and foreign public officials.³¹⁶

The Corrupt Activities Act and the Anti-Corruption Act also identifies particular forms of corruption in respect of certain activities.³¹⁷ In South Africa, these relate to contracts,³¹⁸ procuring and withdrawal of tenders,³¹⁹ auctions,³²⁰ sporting events³²¹ and gambling games or games of chance.³²² In Namibia, these activities are tenders,³²³

³⁰² Section 3 of the Corrupt Activities Act and section 34 of the Anti-Corruption Act.

³⁰³ This is supported inter alia by the references to agreements in section 3 of the Corrupt Activities Act and section 32 of the Anti-Corruption Act.

³⁰⁴ Section 4 to section 11 of the Corrupt Activities Act and section 35, section 36, section 38, section 39 and section 40 of the Anti-Corruption Act. See Burchell and Milton (note 295) at 893.

³⁰⁵ Section 4 of the Corrupt Activities Act.

³⁰⁶ Section 5 of the Corrupt Activities Act.

³⁰⁷ Section 6 of the Corrupt Activities Act.

³⁰⁸ Section 7 of the Corrupt Activities Act.

³⁰⁹ Section 8 of the Corrupt Activities Act.

³¹⁰ Section 9 of the Corrupt Activities Act.

³¹¹ Section 10 of the Corrupt Activities Act.

³¹² Section 11 of the Corrupt Activities Act.

³¹³ Section 35 of the Anti-Corruption Act.

³¹⁴ Section 36 and section 38 of the Anti-Corruption Act.

³¹⁵ Section 39 of the Anti-Corruption Act.

³¹⁶ Section 40 of the Anti-Corruption Act.

³¹⁷ Section 12 to section 16 of the Corrupt Activities Act and section 37 and section 41 to section 47 of the Anti-Corruption Act.

³¹⁸ Section 12 of the Corrupt Activities Act.

³¹⁹ Section 13 of the Corrupt Activities Act.

³²⁰ Section 14 of the Corrupt Activities Act.

³²¹ Section 15 of the Corrupt Activities Act.

³²² Section 16 of the Corrupt Activities Act.

³²³ Section 37 of the Anti-Corruption Act.

auctions,³²⁴ giving assistance in relation to contracts,³²⁵ corruptly using office or position for gratification,³²⁶ sporting events,³²⁷ dealing with, using, holding, receiving or concealing gratification in relation to any offence,³²⁸ attempts and conspiracies³²⁹ and fraudulent concealment of offence.³³⁰

While the two Acts of these two countries are for the most part similar, there is one major difference. The Namibian Anti-Corruption Act establishes an Anti-Corruption Commission to investigate alleged corrupt practices and to educate and inform the public.³³¹ The South African Prevention and Combating of Corruption Act does not create a similar body. An anti-corruption unit did exist until 2002 as part of the South African Police Force, when it was closed down by former National Police Commissioner Jackie Selebi.³³² There are, however, talks of reintroducing such a unit.³³³ This will be an important step ensuring accountability.

2.2.2 The Control over Corruption and the Petroleum Industry

As mentioned earlier, corruption, together with mismanagement of extractive revenues, contribute to a large extent to under-development and poverty in resource-rich countries.³³⁴ Corruption is one of the major contributing factors to the resource curse.³³⁵ For a petroleum regulatory framework to be transparent, a proper framework addressing corruption or attempts at corruption must exist alongside the petroleum regulatory framework. This will also promote the accountability of the state in that state actors can be held accountable for attempts at corruption, which curbs the benefit that the citizens are entitled to.

³²⁴ Section 41 of the Anti-Corruption Act.

³²⁵ Section 42 of the Anti-Corruption Act.

³²⁶ Section 43 of the Anti-Corruption Act.

³²⁷ Section 44 of the Anti-Corruption Act.

³²⁸ Section 45 of the Anti-Corruption Act.

³²⁹ Section 46 of the Anti-Corruption Act.

³³⁰ Section 47 of the Anti-Corruption Act.

³³¹ Section 2 and section 3 of the Anti-Corruption Act.

³³² Barnard DK "South Africa: DA Welcomes Re-Establishment of Anti-Corruption Unit" available at <http://allafrica.com/stories/201307121113.html> [accessed 02.02.2014].

³³³ Barnard (note 332); SAPA "Anti-Corruption Unite Should be 'Secure'" 22 August 2013 *News24* available at <http://www.news24.com/SouthAfrica/News/Anti-corruption-unit-should-be-secure-20130822> [accessed 02.02.2014].

³³⁴ Al Faruque (note 247) at 66.

³³⁵ Al Faruque (note 247) at 68.

In South Africa, debates about corruption within the extractive industries have identified this issue as an area of concern.³³⁶ Similarly, the Namibian petroleum industry has especially been plagued with allegations of corruption. Of particular concern in Namibia is the way in which petroleum licences have been awarded to local, who have have proceeded to sell these licences to foreign companies for millions of Namibian Dollars.³³⁷ The beneficiaries of petroleum licences consists predominantly of rich businessmen, politicians and their family and friends.³³⁸

Although corruption is not specifically a petroleum-industry problem but more a societal problem in general, it does exert a major influence over the petroleum industry. Given the potential that a petroleum-producing industry may have for a host country, the prevention and combating of corruption should be one of the dominant factors in a regulatory framework for petroleum. This will not only promote transparency and accountability in the petroleum industry, but will ensure greater protection for the interests of the host country by channeling the petroleum wealth down to the people, instead of into the hands of an elite few.

2.2.3 Assessment of the Prohibition on Corrupt Practices

There are three important aspects of the above discussion that have a bearing on the petroleum industry in South Africa and Namibia. First, the common law crime of bribery still applies in Namibia and some scholars are of the view that it still applies in South Africa as well. The common-law crime of bribery is committed by both the person tending the advantage and the person accepting the advantage. The crime applies to the bribery of state officials and employees, as well as judicial officers.

Second, in Namibia and South and Namibia, there is a general crime of corruption. This crime applies to commercial and business practices as well and the bribery of private persons. This is of particular importance in the petroleum industry, as the exploitation of petroleum relies largely on contractual arrangements between parties.

³³⁶ Hughes (note 66) at 11.

³³⁷ Staff Reporter “A Mine of Different Outlooks” *Insight: Mining in Namibia* 2014 at 3; Immanuel S “Oil Fields for Friends” *The Namibian* 15 August 2014 at 1.

³³⁸ Immanuel (note 337) at 1.

By criminalising corruption in the private sector as well as the public sector, greater transparency is given to the regulation of petroleum.

Third, the bribery of a public officer is a specific crime of corruption in South Africa and Namibia. A public officer refers to a person who is a member, an officer, an employee or a servant of a public body.³³⁹ This includes any department of state in South Africa or a ministry in Namibia.³⁴⁰ In South Africa, a public body also includes any functionary or institution exercising a public power or performing a public duty or function in terms of any legislation.³⁴¹ In Namibia, it includes any corporation, board, council, institution or other body, whether incorporated or unincorporated, or any functionary exercising a public power or performing a public function in terms of any law or the common law.³⁴²

South Africa and Namibia have taken great strides in promulgating legislation dealing extensively with corruption. The framework for combating corruption in Namibia and South Africa is influenced by the international conventions and protocols to which these two countries are signatories. The *UN Convention*, *AU Convention* and the *SADC Protocol* apply to Namibia and South Africa. The domestic legislation of these two countries must therefore reflect its obligations in terms of these international documents. This is achieved through the legislation discussed above.

However, as stated in the introduction, mere legislation prohibiting corruption is not enough. Effective measures must be taken to combat corruption within the framework of this legislation. To this extent, both South Africa and Namibia have taken steps towards tracking and publishing on corrupt practices. So, for example, *Insight* magazine in Namibia, which is published monthly, contains a “Corruption Tracker” column. Here, the magazine discusses resolved cases, new cases and talking points. Similarly, South Africa’s Corruption Watch is an online platform that tracks and

³³⁹ Section 1 of the Corrupt Activities Act and section 32 of the Anti-Corruption Act.

³⁴⁰ Section 1 of the Corrupt Activities Act and section 32 of the Anti-Corruption Act.

³⁴¹ Section 1 of the Corrupt Activities Act.

³⁴² Section 32 of the Anti-Corruption Act.

discusses corruption.³⁴³ South Africa also has the National Anti-Corruption Forum, which was launched in 2001, which plays more of an advisory role.³⁴⁴

Endeavours such as Corruption Watch, the National Anti-Corruption Forum and *Insight's* Corruption Tracker are important in informing and educating the public about corruption. For anti-corruption legislation to be applied effectively, members of the public and government officials need to know when conduct will amount to corruption or will constitute bribery. Aside from educating the public, it also ensures greater transparency by reporting on corruption. However, even these attempts at greater transparency are not sufficient. The framework for corruption in South Africa and Namibia must also ensure accountability. In other words, those guilty of corruption (including the state as bribee) must be held accountable for their actions.

3. Implications of the Regulatory Framework on the Ownership of Petroleum Resources

Chapter Four above discusses the methods that a state, which assumes access over petroleum resources, can employ to grant access to these resources to petroleum companies. Whatever the correct interpretation of ownership of minerals in South Africa is, it is clear that the state in both South Africa and Namibia exercises control over petroleum resources. However, as we have seen above, both the South African and Namibian governments have to exercise their control over petroleum resources for the benefit of the respective nations.

This places the Namibian and South African states in a peculiar situation. On the one hand, the state controls access to the resources. In this sense, the state is a “regulator” through which private petroleum companies can gain access to the petroleum resources of South Africa and Namibia. As regulator, the state may grant rights to petroleum companies to search for and to extract petroleum resources.

In South Africa, the state is assisted in this role by the Petroleum Agency SA. The Minister of Mineral Resources, together with the Petroleum Agency SA, acts as

³⁴³ See their website at <http://www.corruptionwatch.org.za/> [accessed 27 October 2013].

³⁴⁴ See their website at <http://www.nacf.org.za/> [accessed 28 October 2013].

administrative body in charge of the granting, issuing, refusing controlling, administering and managing the rights to exploit mineral and petroleum resources.³⁴⁵

The Minister, acting on behalf of the State, also has a discretion to determine and levy, in consultation with the Minister of Finance, any fee or consideration payable in terms of any relevant Act of Parliament.³⁴⁶ Any person who wishes to search for and extract mineral and petroleum resources must apply to the State, represented by the Minister of Mineral Resources, for the necessary right.³⁴⁷

In Namibia, the Minister of Mines and Energy, assisted by the Petroleum Commissioner, acts on behalf of the state and may grant reconnaissance, exploration and production licences to petroleum companies to authorise them to search for and extract petroleum.³⁴⁸ The Minister must also enter into a petroleum agreement with the holder of a licence. This agreement is discussed in more detail in Chapter Seven below.

The state's role, however, is not limited to that of regulator. In exercising control over petroleum resources in South Africa and Namibia, the states also act as "agents" of their people.³⁴⁹ As such, the states have to ensure that, in acting as regulator, the interests of the people of South Africa and Namibia are protected and that they enjoy the ultimate benefit of the exploitation of the petroleum resources of these two countries. The state in South Africa and Namibia therefore fulfils a dual function in respect of petroleum resources. On the one hand, through its control over these resources, the states act as regulators, granting access to petroleum resources. On the other hand, the states act as agents of their people and have to ensure that petroleum resources are exploited for the benefit of their people.

4. Conclusion

The states in South Africa and Namibia act as regulator and control access to the petroleum resources located within the boundaries of these two countries.³⁵⁰ However, when acting as regulator and granting access to petroleum resources, states fulfil a

³⁴⁵ Section 3(2)(a) of the MPRD Act.

³⁴⁶ Section 3(2)(b) of the MPRD Act.

³⁴⁷ Section 5(4)(b) of the MPRD Act.

³⁴⁸ Section 9(1) of the Petroleum Act.

³⁴⁹ Soros G "Foreword" in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at xii.

³⁵⁰ This is discussed in Chapter Six below.

second function: it acts as agent of the nation and must ensure that the nation ultimately benefit from the exploitation of the petroleum resources of South Africa and Namibia.

This creates a difficult situation for the states. On the one hand, they have to ensure that the petroleum company is given the best deal possible, as the states are dependent on the financial and technical capabilities of these companies to ensure that petroleum resources are exploited optimally. On the other hand, states have to ensure that the nation ultimately benefits from the exploitation of “its” resources.

As regulator on the one hand and agent on the other hand, the South African and Namibian states have to ensure that a balance is struck between the interests of the petroleum company and the interests of the nation. This can only be achieved if the regulatory framework for petroleum resources in South Africa and Namibia is designed in such a way to allow the states to achieve this balance. The legislation cannot be designed either just around the interests of the petroleum company or around the interests of the nation. The interests of both parties have to be acknowledged and pursued.

The state as regulator has to administer petroleum resources within the confines of the principles of just administrative action. This limits the powers of the state, while promoting transparency and accountability. The framework for just administrative action is, however, not perfect. In Namibia especially, the framework tends to protect the state by not promoting access to information, which reduces state accountability while at the same time does not promote transparency. In both countries, petroleum revenues are not regulated, which not only goes against transparency, but also negatively affects the right of the citizens of these two countries from benefitting from petroleum resources. As regulator, the state should have clear and transparent policies in place on how to deal with petroleum revenues

PART C:

CONCLUSION

In Part A above, the general aspects of petroleum is discussed. In that part, the terminology used internationally in the petroleum upstream petroleum industry is discussed, as well as the general principles of ownership of and control over petroleum resources. In Part B, the general principles of ownership of and control over petroleum resources in South Africa and Namibia is discussed. The focus is on the role of the state and the dual function that the state fulfils in respect of petroleum resources. The measures for limiting state control over petroleum resources are also discussed, as are the measures for determining access to petroleum resources in South Africa and Namibia. Part B deals with the upstream petroleum legislation in these two countries, as well as the environmental legislation which gives further content to petroleum resources. It includes an evaluation of the measures for ensuring that the host country benefits from petroleum resources (through taxation, royalties and socio-economic empowerment).

The last part of the thesis, Part C, is the conclusion. Here, the conclusions drawn from the previous parts are summarised. Specifically, the conclusion casts light on how the elements of transparency, accountability and balance of interests are reflected in the regulatory framework for upstream petroleum resources in South Africa.

Chapter Ten:

CONCLUDING REMARKS: TRANSPARENCY, ACCOUNTABILITY AND INTEREST-BALANCING IN PETROLEUM LAW

1. A Proper Regulatory Framework for Upstream Petroleum Resources

The foundation of any petroleum regulatory regime is the *model of ownership* chosen by a state in respect of petroleum resources.¹ Flowing from this is the choice of *what authorisations* are used to grant access to petroleum and how these authorisations are *allocated*.² These three elements make up the basic structure of a regulatory framework for petroleum resources. In the light hereof, Namibia and South Africa have both opted for a regime in terms whereof the state controls petroleum resources and is responsible for granting access to these resources. The basic petroleum laws of these two countries have also identified what authorisations should be used to grant access to petroleum resources and how these authorisations are allocated.

Having a basic petroleum regulatory regime in place is, however, not enough. Petroleum can be a curse for a country, rather than a blessing.³ Whether it is a curse depends on whether a proper regulatory framework for petroleum exploitation is in place. In designing this framework, a country is faced with a difficult dilemma. On the one hand, a state has an obligation to ensure that it gets the most out of these resources

¹ See for example Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 79; Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 5.

² Barma et al (note 1) at 79; Onorato WT *Legislative Frameworks Used to Foster Petroleum Development* (1995) Washington The World Bank at 6.

³ Chapter One above.

for the benefit of its citizens and national economic growth. On the other hand, a state (especially a developing one such as Namibia and South Africa) relies on petroleum companies to assume responsibility for exploring for and producing the resource and therefore needs to ensure that the interests of petroleum companies are protected as well. This tension between interests mirrors on a domestic level the same tension that faced the development of the principle of permanent sovereignty over natural resources.⁴ The state in South Africa and Namibia therefore assumes two roles. The first is that of the regulator, responsible for regulating access to petroleum resources. The second role is that of agent of its citizens, responsible for ensuring the petroleum resources falling under its control is exploited for the benefit of its principal.

The regulatory framework for petroleum resources is the vehicle through which the state exercises these roles. In order for a legislative framework for petroleum resources to ensure that the state succeeds in balancing these two roles and managing the tension between the interests of petroleum companies and the interests of the host state, it needs to give effect to various policy choices by the state in respect of the regulation of ownership of, control over and access to petroleum resources within a host country.

The most important set of policies regarding natural resources are those that deal with increased transparency.⁵ Transparency must be present in all aspects of petroleum regulation. To ensure transparency, there has to be an openness and availability of information. This includes clear publicity on how rights to petroleum are negotiated and granted, what amounts are received by government in exchange for access to petroleum, how the government uses these amounts, how much resources are produced and where these resources go once produced.

The regulatory framework within which a state exercises control over access to petroleum must also contain measures aimed at holding a state accountable to its people if it fails to exercise proper control over petroleum resources for the benefit of its people. The second important policy choice with regard to the regulatory framework for petroleum resources therefore is how government is held accountable to its people if it fails to exercise proper control over petroleum resources. Included in the principle of

⁴ Chapter Three, par 2.

⁵ Chapter One, par 2.1.1.

accountability is how the powers of the state are limited in respect of its control over petroleum resources.⁶ Boundaries are set within which the state must exercise its powers in respect of petroleum. These boundaries are legislated or well-established common law principles. The measures in South Africa and Namibia for limiting state control over petroleum resources therefore promote accountability and transparency.

South Africa and Namibia are not major players in the international petroleum industry. However, there are indications that these two countries may have viable petroleum resources to become petroleum producing countries. It is therefore the opportune time to examine and evaluate the current petroleum regulatory regimes for these two countries. To ensure that the petroleum industries in these two countries are developed to their full potential, a proper regulatory framework regulating upstream petroleum resources must be in place that reflect and promote the elements of transparency and accountability while at the same time ensuring that a balance is struck between the interests of the citizens of South Africa and Namibia and the petroleum companies doing the exploitation.

2. South African and Namibian Regulatory Frameworks by Comparison

This thesis determines and evaluates the regulatory framework for upstream petroleum resources in South Africa and Namibia. It seeks to ascertain whether the South African and Namibian states, in fulfilling their dual functions in respect of petroleum, ensures that these resources are exploited for the ultimate benefit of the people of these two countries.

In South Africa, petroleum resources vest in the nation and the state is custodian thereof for the benefit of the nation. In Namibia, the state owns petroleum resources and has to ensure that it is exploited for the benefit of the people of Namibia.⁷ Both countries generally reflect the international standards on sovereignty and state control or

⁶ Chapter One, par 2.1.2.

⁷ Chapter Four above.

ownership of petroleum resources.⁸ In both states, however, control over petroleum resources is exercised with a petroleum regulatory framework. In order for this petroleum regulatory framework to operate to its full potential, it needs promote three essential characteristics, namely transparency, accountability and balance of interest.⁹

2.1 Transparency and Accountability

Transparency and accountability is seen as the remedies to cure the resource curse.¹⁰ In order to promote the elements of transparency and accountability, the petroleum regulatory framework in South Africa and Namibia must be characterised by openness, availability of information and government accountability. These features must be present in the way that the state grants access to petroleum and the way the legislation limits the control that the state has over petroleum resources.

2.1.1 Granting Access to Petroleum

The states in South Africa and Namibia control petroleum resources and grant access to petroleum resources to petroleum companies. Access to petroleum is granted under the MPRD Act and the Petroleum Act respectively. These acts, however, only apply to those resources which qualify as petroleum in terms of these acts.¹¹ The MPRD Act and the Petroleum Act contain statutory definitions of petroleum in line with the geological interpretation of petroleum.

The MPRD Act and the Petroleum Act deal in some detail with the granting of access to and managing of petroleum resources. Access is granted through different instruments in South Africa and Namibia. In South Africa, the state can award reconnaissance permits, exploration rights and production rights to petroleum. It is also possible in South Africa to apply for a technical co-operation permit, allowing the holder thereof to conduct certain desktop studies. In Namibia, access to petroleum is granted by means of reconnaissance, exploration and production licences.¹² Although

⁸ See for example Cawood F "Allocation of Petroleum Development Rights in South Africa: A Comparison with Current International Practices" (2006) Research Paper presented as part of LLM, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee at 15.

⁹ Chapter One, par 2.1.

¹⁰ Soros G "Foreword" in Humphreys M, Sachs JD and Stiglitz JE (eds) *Escaping the Resource Curse* (2007) New York Columbia University Press at xiv.

¹¹ Chapter Five, par 2.

¹² Chapter Five, par 3.3.1.

there may be some uncertainty in respect of the difference between reconnaissance and exploration operations, this uncertainty is cleared up by a proper understanding the technicalities of reconnaissance and exploration operations. In general, both jurisdictions are transparent as to what types of rights to petroleum may be granted. The two Acts also set out the rights of holders of each type of right, although in South Africa these rights are set out in a more detailed fashion than in Namibia, thus ensuring greater clarity as to what a holder of a specific right may do. In Namibia, the rights of licence holders are defined in broader terms, this creating unnecessary uncertainty. For example, the Petroleum Act does not provide for the right of the holder to use water found in the licence area, as is the case in South Africa.

Both the MPRD Act and the Petroleum Act are also clear as to the duration of rights to petroleum.¹³ The procedures for applying for rights to petroleum and for applying for renewals of these rights are also set out in detail in the Acts.¹⁴ However, an overview of the different provisions in South Africa and Namibia clearly indicate that the discretion of the Minister in South Africa is limited substantially, as opposed to Namibia where the Minister enjoys a much greater degree of discretion.¹⁵ In this respect, therefore, the South African framework is much more transparent than the Namibian framework. The South African MPRD Act also ensures greater accountability by limiting the discretion of the Minister. In Namibia, an applicant's access to petroleum resources depend to a large extend on the discretion of the Minister.

The MPRD Act sets out in some detail the obligations of holders of rights to petroleum, as does the Petroleum Act.¹⁶ The obligations of holders in Namibia are further supplemented by the petroleum agreement, which is in line with interational practice.¹⁷ This way, applicants and holders know what is expected of them and the general public also know what to expect of holders. Both jurisdictions also require holders to keep records and submit regular reports.¹⁸ This is important for a state to be able to comply

¹³ Chapter Five, par 3.3.2.

¹⁴ Chapter Five, par 3.3.3.

¹⁵ Chapter Five, par 3.3.3.1, par 3.3.3.3 and par 3.3.3.6.

¹⁶ Chapter Five, par 3.3.4.

¹⁷ Chapter Five, par 3.3.4.

¹⁸ Chapter Five, par 3.3.6.

with its obligation to regulate and control petroleum exploitation, thus ensure greater accountability. This also promotes transparency by requiring an openness regarding the activities of holders. Although the information is not readily available to the public, this may be justified in the light of the interests of petroleum companies to have certain information of their activities to be kept confidential.

Access to petroleum, however, is not only dealt with under the MPRD Act and the Petroleum Act. Legislation and policies dealing with the environment, royalty and taxation and socio-economic empowerment further supplement access to petroleum.

Namibia and South Africa generally adhere to international practice and have incorporated various internationally accepted environmental management tools in its legislation.¹⁹ Both jurisdictions follow the international trend of requiring environmental authorisation for petroleum operations.²⁰ Both jurisdictions furthermore place various obligations on applicants for and holders of rights to petroleum in respect of the environment, which includes assessing environmental damage, submitting reports and making provision for decommissioning, rehabilitation and production closure.²¹ Where the jurisdictions differ, however, is in providing for the justiciability of environmental rights.²² South Africa guarantees the right to a clean environment in its Constitution, while the Namibian Constitution deals with it under the principles of state policy, which are not enforceable. Furthermore, the EMA, unlike NEMA, does not provide for standing for persons who wish to enforce their rights in respect of the environment. This makes it very difficult for the public to take action against holders of petroleum licences to comply with their obligations in terms of the EMA. To ensure accountability, measures must be put in place to facilitate proper enforcement of the environmental right. Although it is still possible to enforce environmental rights in terms of common law, the scope is much narrower. A person can only rely on common law to enforce environmental rights if that person is directly affected by it.²³

¹⁹ Chapter Six, par 2.1 and par 2.4.

²⁰ Chapter Six, par 2.4.2.

²¹ Chapter Six, par 2.4.

²² Chapter Four, par 2.1.3 and Chapter Six, par 2.3 and par 2.4.1.

²³ Chapter Six, par 2.6.

The fiscal framework for petroleum activities in Namibia and South Africa is generally couched in clear and certain terms, thus ensuring transparency as regards to royalty and taxes applicable to petroleum operations.²⁴ In South Africa in line with the principle of transparency, socio-economic empowerment is also legislated, supported by various policy documents. In Namibia, however, the situation regarding socio-economic empowerment is uncertain. While there are specific attempts at promoting empowerment (especially from a labour perspective), the country's general empowerment framework has not been legislated, although attempts are made at enforcing it. This creates confusion and a lack of general transparency as regards the country's empowerment policies and objectives.

2.1.2 Limitation on State Control

Rights to petroleum are regulated by statute and allocated by public authorities. This invokes the principles of fair and reasonable administrative action subject to which the general petroleum legislative framework operates.²⁵ In general, this entails that states, when exercising control over petroleum resources and allocating access to these resources, act lawfully, reasonably and fairly.

The right to just administrative fairness is entrenched by the Constitutions of the Republic of South Africa and Namibia.²⁶ This right may only be limited under specific circumstances provided for in the Constitutions. By constitutionally entrenching this right, the legislatures of these two countries promote accountability and transparency in general and specifically for purposes of this thesis, in respect of petroleum. Any person who is affected by a decision taken by a functionary in respect of petroleum may apply to a court for appropriate relief if this decision was not taken according to the principles of just administrative action. In this way, the state is held accountable for its actions in respect of petroleum resources.

In both South Africa and Namibia, various decisions in respect of minerals have been the subject of an application based on the right of just administrative action.²⁷

²⁴ Chapter Seven.

²⁵ Chapter Nine.

²⁶ Chapter Nine, par 2.1.1.

²⁷ Chapter Nine, par 2.1.

Although the courts are yet to consider an application based on this right in respect of petroleum, the principles will be the same for decisions in respect of petroleum. Every application, however, has to be considered on a case-by-case basis. Decisions taken by functionaries in respect of petroleum are administrative acts and therefore must therefore adhere to certain basic principles.²⁸ First, decisions must be taken in a reasonable time. Secondly, decisions must be lawful. Thirdly, decisions must be reasonable. Fourthly, the functionary must act in a procedurally fair manner. In South Africa, an additional requirement is imposed, namely that a consultative process must be followed, considering the severe inroads that the granting of rights to petroleum may have on the rights of certain individuals or communities. This requirement is not present under Namibian law. This reduces accountability in Namibia, in that persons who may be affected by certain decisions taken by the state are not consulted or heard.

Key in just administrative action is access to information. By promoting access to information, the constitutional values of transparency, openness, participation and accountability are upheld.²⁹ This right is entrenched in South Africa in terms of the South African Constitution and given effect to by empowering legislation.³⁰ This right is, however, currently under threat from pending legislation, which empowers the state to classify and to withhold information.³¹ In Namibia, on the other hand, there are very few measures dealing with the right of access to information and the regulatory framework for petroleum seems to promote secrecy rather than a culture of openness and availability of information. Transparency and accountability in respect of the regulation of upstream petroleum resources requires access to information. There is scope in both countries, especially Namibia, to develop further the right of access to information. This in turn will promote transparency and accountability. However, the right to information must be developed with the interests of the petroleum companies in mind as well. Some information must, for commercial purposes, be treated as confidential.

²⁸ Chapter Nine, par 2.1.3.

²⁹ Chapter Nine, par 2.1.3.7.

³⁰ Chapter Nine, par 2.1.3.7.

³¹ Chapter Nine, par 2.1.3.7.

Finally, a regulatory framework for petroleum needs to prevent and prosecute corruption to limit state control, ensure transparency and promote accountability.³² In South Africa and Namibia, bribery and corruption is criminalised in terms of common law and statutory law. Namibia has a body in place to investigate corruption and bribery. South Africa envisages re-introducing a similar body. To ensure that effect is given to the states' statutory, common law and international obligations in respect of bribery and corruption, states must ensure that bodies are in place to investigate and to prosecute corruption. South Africa in particular must take steps in establishing a body to fulfil this function. This way, it will ensure that the state control over petroleum resources is limited, which in turn promotes transparency and accountability in the petroleum regulatory framework.

2.2 Balance of Interests

In South Africa, petroleum resources vest in the nation and the state is the holder thereof for the benefit of the nation. The state controls petroleum resources within South Africa for the benefit of the nation. In Namibia, the state owns the petroleum resources, but is under a similar obligation to exercise its ownership of and control over petroleum resources for the benefit of Namibian citizens.³³ In both, the people of South Africa and Namibia are the ultimate beneficiaries of the petroleum resources within these two countries. To promote the petroleum industries of these two countries, it is necessary to attract investors to do the exploitation. At the same time, however, the rights of investors need to be protected as well. A regulatory framework for petroleum needs to balance the interests of the people of the host country with the interests of the petroleum company who has been granted access to the petroleum resources.

2.2.1 Interests of the People of South Africa and Namibia

As a starting point, both the South African MPRD Act and the Namibian Petroleum Act recognise that the citizens of these two countries should benefit from petroleum resources. In South Africa, this is however expressed in much clearer terms, while in Namibia it is implied.³⁴ The regulatory frameworks for petroleum in South Africa and

³² Chapter Nine, par 2.2.

³³ Chapter Four, par 2.3.

³⁴ Chapter Four, par 2.2 and par 2.3.

Namibia are determined primarily by legislation. This way, it promotes certainty in the granting and managing of rights to petroleum. Citizens have certainty on the process to be followed, information that must be given and the obligations placed both on the state and petroleum companies in respect of petroleum resources.³⁵

The people of South Africa and Namibia also have a right to a clean environment, which is protected in the South African Constitution and recognised in the Namibian Constitution.³⁶ General environmental legislation has been passed in both countries and applies to the petroleum industry as well.³⁷ Neither country, however, has passed legislation dealing specifically with the environmental impacts of petroleum operations on the environment. Notwithstanding this, the general environmental framework incorporates various internationally accepted environmental management tools that are applicable in the petroleum exploitation as well. Obligations relating specifically to the environment are placed on applicants for rights to petroleum as well on holders. These obligations ensure a continuous assessment and evaluation of the impact of petroleum operations on the environment. Provision is also made for consequences for the holder where it fails to comply with these obligations.³⁸ In South Africa, provision is furthermore made for the enforcement of the the right to a clean environment. This, however, lacks in Namibia, where there is no proper framework for enforcing environmental rights.³⁹

In South Africa, the larger public or sections of the public affected by petroleum exploitation are given various opportunities to consult with the state and applicants for rights to petroleum.⁴⁰ In Namibia, however, interested and affected parties are only consulted when application for an ECC is made.⁴¹ As a result, there is much less transparency and accountability in the Namibian framework when it comes to consultations with interested and affected parties. In line with the general spirit of state accountability, the South African and Namibian Constitutions entrench the right of its citizens to just administrative action. Any person affected by a decision taken in terms

³⁵ Chapter Five.

³⁶ Chapter Four, par 2.1.3.

³⁷ Chapter Six, par 2.4.

³⁸ Chapter Six, par 2.5.

³⁹ Chapter Six, par 2.3 and par 2.4.1.

⁴⁰ Chapter Five, par 3.3.3.2 and Chapter Six, par 2.4.2.1.

⁴¹ Chapter Six, par 2.4.2.2.1.

of petroleum has the right to take that decision on review. Not only does this promote transparency and accountability,⁴² it ensures that measures are in place for persons of South Africa and Namibia to enforce their right to just administrative action. Similarly, the right of access to information operates to ensure that there is openness in the petroleum industry, thereby adding further protection to the interests of the people of South Africa and Namibia.⁴³ This is further given content to in the petroleum industry through the obligation on petroleum companies to keep proper records and report on their activities. However, as stated above, this information is not readily available to the public.⁴⁴

It is, however, not enough merely to ensure that the interests of the people of South Africa and Namibia are protected. Measures must also be put in place in terms whereof the people actually *benefit* from the exploitation of petroleum resources. In South Africa and Namibia, the state does not actively participate in the exploitation of petroleum resources, but leaves it to independent petroleum companies, although co-operation with the state petroleum companies are possible and does happen from time to time. The host nations therefore do not directly benefit from the petroleum resources. Other measures must be put in place to ensure that some benefit is derived from the activities of petroleum companies. Developing countries now recognise that, given the demand for petroleum, there is an opportunity to insist on higher royalties and taxes and larger contribution to social and economic goals.⁴⁵ To this effect, the states in South Africa and Namibia derive a financial benefit from petroleum companies through royalties and taxes. This is the most favourable way of ensuring that the host country benefits from the exploitation of its resources.⁴⁶ Royalties are imposed on petroleum produced in South Africa and Namibia and the income generated by the petroleum companies are taxed.⁴⁷ Certain activities and transactions attract further taxes, for example withholding tax and capital gains tax.⁴⁸ The rates of royalties and taxes in

⁴² See paragraph 2.1 above.

⁴³ See 2.1 above.

⁴⁴ Chapter Nine, par 2.1.3.7.

⁴⁵ Martin JG and MacNaughton AL “Sustainable Development: Impacts of Current Trends on Oil and Gas Development” 2004 *Journal of Land, Resources and Environmental Law* 257 at 260 – 261.

⁴⁶ Chapter Seven, par 1..

⁴⁷ Chapter Seven, par 3 and par 4.

⁴⁸ Chapter Seven, par 4.1.2.

Namibia and South Africa are favourable compared to other countries, yet still does not shift the fiscal risk onto the host state. A balance is struck between ensuring that the host state benefits from its petroleum resources and investors are not overcharged and therefore discouraged. Neither party is exposed to exponential financial risk. A reasonable trade-off is achieved, which will encourage investment as well.⁴⁹

The regulatory framework for petroleum resources in South Africa and Namibia also provide for socio-economic development.⁵⁰ In South Africa, provisions relating to socio-economic empowerment are given statutory recognition. This ensures a more direct benefit for the people of South Africa.⁵¹ In both jurisdictions, petroleum companies are obliged to have certain local content in their dealings in these countries, specifically with regard to previously disadvantaged persons.⁵² Aside from promoting employment equity and local participation, the frameworks for socio-economic development in South Africa and Namibia also promote training and skills development.⁵³ This ensures that the petroleum operations of a company are used to develop the South African and Namibian economies and socio-economic goals. Notwithstanding this, however, Namibia's unclear black economic empowerment policies must be criticised as creating uncertainty and inconsistency.⁵⁴ To date, Namibia does not have any legislation specifically addressing socio-economic empowerment. Similarly, Namibia's petroleum regulatory framework does not address the interests of communities. South Africa's MPRD Act expressly recognises the preferent right of communities in respect of petroleum.⁵⁵

2.2.2 Interests of the Petroleum Companies

In determining whether the interests of petroleum companies in Namibia and South Africa are protected, one first has to consider the authorisation in terms of which a petroleum company is granted access to these countries' petroleum resources and

⁴⁹ Chapter Seven, par 4.3 and par 6.

⁵⁰ See Chapter Eight above.

⁵¹ Chapter Eight, par 3.1.

⁵² Chapter Eight, par 4.1.

⁵³ Chapter Eight, par 4.1.

⁵⁴ Hopwood G *Namibia's New Frontiers: Transparency and Accountability in Extractive Industry Exploration* (2013) Windhoek Institute for Public Policy Research at 5. The author states at 6 that "...the absence of a Black Empowerment Policy or framework (and law) means that the 'positive discrimination' associated with BEE can be applied in an *ad hoc* and arbitrary manner."

⁵⁵ Chapter Eight, par 4.2.

whether this provides sufficient security of tenure to the holder. It is vital for a petroleum company to have a strong right, or secure tenure, which will protect its interests as well.

In South Africa and Namibia, security of tenure in respect of rights to petroleum is generally promoted.⁵⁶ The state grants exclusive rights to petroleum companies to access the petroleum resources situated within the boundaries of these countries. Petroleum companies assume the bulk of the risks associated with petroleum exploitation, but also enjoy the benefits. Once petroleum is extracted, ownership of the produced petroleum vests in the petroleum company, who may deal with it as it pleases, subject to paying the relevant royalties and taxes.⁵⁷ The exclusive rights awarded to the petroleum companies to explore for and to produce petroleum are limited real rights. As such, these rights are considered property for purposes of the constitutional property clauses of South Africa and Namibia.⁵⁸ The rights holders are therefore protected from expropriation, unless it is in accordance with the constitutions.

While the activities of petroleum companies are strictly regulated by the state and various obligations are imposed on the companies to ensure that the interests of the people of South Africa and Namibia are still protected, petroleum companies enjoy exclusive rights and ultimately become the owners of the produced petroleum, to deal with as they please. The obligations imposed on petroleum companies are generally described with certainty, although this is not always the case in Namibia.⁵⁹ Furthermore, in Namibia the discretion given to the Minister to grant or refuse an application for a licence or for the renewal of a licence does not operate in favour of a petroleum company, as the regulatory regime lacks certainty. In South Africa, a petroleum company is assured that, if it complies with all prescribed obligations, it will be granted the relevant right which it applied for. In Namibia a petroleum company does not have this assurance.⁶⁰

⁵⁶ See also Cawood (note 8) at 16.

⁵⁷ Chapter Five, par 3.3.

⁵⁸ Chapter Five, par 3.2.

⁵⁹ See par 2.1.1 above.

⁶⁰ Chapter Five, par 3.3.3.1, par 3.3.3.3 and par 3.3.3.6.

Both countries make it possible for holders to transfer or encumber their rights, albeit subject to state oversight. This is necessary if a petroleum company wishes to raise capital or go into partnership with another entity.

The fiscal frameworks imposing royalties and taxes in Namibia and South Africa are relatively favourable for investors compared to other countries. Nevertheless, the Namibian provisions in respect of royalties and taxation are more onerous than its South African counterpart and there is less provision made for investor relief and incentives.⁶¹ While this may operate in favour of the state to ensure a greater benefit for the state, Namibia runs the risk of estranging investors.

Finally, the lack of clarity regarding socio-economic empowerment in Namibia may be a concern for investors. In South Africa, clear provisions are made as to how socio-economic empowerment is to be achieved. In Namibia, there is no proper framework for socio-economic empowerment, though the state does try to enforce its general policy with regard to empowerment. This creates confusion and generally lacks proper transparency and accountability.⁶²

3. Conclusion

The petroleum regulatory frameworks in South Africa and Namibia generally reflect the three basic elements of a proper regulatory framework for petroleum. The petroleum regulatory frameworks are attractive for investors while at the same time ensuring that the state, on behalf of its citizens, also obtain some benefits from its petroleum resources.

In some areas, however, the elements of transparency, accountability and interest-balancing may still be further developed and refined to ensure an equilibrium between the interests of the host countries and the interests of petroleum companies. The main areas identified where these elements are lacking are the following:

- (i) In Namibia, a wide discretion is granted to the Minister in respect of the granting or refusing of applications for rights to petroleum and renewal of

⁶¹ Chapter Eight, par 6.

⁶² Chapter Eight.

- rights. Furthermore, the rights of licence holders are stipulated in broad terms, which may cause uncertainty.
- (ii) Many important provisions relating to petroleum exploitation in Namibia is dealt with in terms of the Model Petroleum Agreement. Many of these provisions are, however, negotiable. It is advised that the Petroleum Act expand on the basic conditions that must be contained in the Petroleum Act to provide, for example, for compulsory EIAs and consultations with interested and affected parties.
 - (iii) South Africa does not provide for petroleum agreements. These agreement fulfil an important role in expanding on the rights and obligations of holders, provided that they are properly supported by means of empowering legislation while at the same time allowing sufficient room for negotiation.
 - (iv) While both countries allow for the transfer or encumbrance of rights to petroleum, they are unclear as to what transactions this may entail. A better framework should be put in place to deal with the encumbrance of rights to petroleum to foster investment.
 - (v) The right to a clean environment is not guaranteed under the Namibian Constitution and no provision made in the environmental or other legislation for the enforcement of environmental rights. This issue should be addressed, especially given the potential impacts that petroleum exploitation may have on the environment.
 - (vi) In Namibia, there has generally been a call for greater transparency and accountability in the resource extraction industries, especially insofar it relates to access to information, but these calls have so far gone unheeded in Namibia.⁶³
 - (vii) Namibia does not provide for competitive investment incentives for petroleum companies, compared to other jurisdictions, including South Africa.
 - (viii) In Namibia, there is a lack of a clear, transparent and enforceable socio-economic transformation framework. Furthermore, Namibia does not recognise the rights of communities in respect of petroleum.

⁶³ Hopwood (note 54) at 6.

- (ix) Both countries fail to make provision for measures to use petroleum revenue to ensure a long-term benefit from this resource. Although it may be premature to have this in place already, it is advisable at least to investigate the different possibilities with reference to other established and emerging petroleum producing countries.
- (x) Both Namibia and South Africa have resisted becoming members of the Extractive Industries Transparency Initiative (“**EITI**”). Namibia’s reasoning for not joining is unclear, whereas in South Africa the reasons appear to include the fact that South Africa feels it would not benefit from it, as it has been involved in the extractive industry for more than a century.⁶⁴ Another reason appears to be that the South African government does not feel that membership will be suitable, as there is a significant difference between mineral and petroleum resource revenue.⁶⁵ Notwithstanding the resistance from politicians, the EITI Secretariat is adamant that South Africa’s support for this initiative would resonate through the African continent and “would send a clear message that could add considerable impetus to the initiative globally”.⁶⁶

From the above, it is clear that the South African framework for petroleum resources in general goes to greater lengths to ensure that the elements of transparency, accountability and balance of interest are present and promoted. In Namibia, on the other hand, important issues such as the right of the citizens to benefit from the exploitation of natural resources (including petroleum) and the need for greater transparency and accountability have only recently emerged.

The difference in approaches may be explained with reference to the historical regulation of minerals and petroleum in the two countries. In Namibia, the state has always been regarded as owner of these resources. In South Africa, the regulatory regime for minerals and petroleum has gone through various different stages, resulting

⁶⁴ Hughes T “South Africa: A Driver of Change” (2012) Working Paper Series, Revenue Watch Institute at 9.

⁶⁵ Hughes (note 64) at 9.

⁶⁶ Hughes (note 64) at 9.

in the current framework which is at pains to reflect the general transformation policy of the country as a whole.

What can be said for the Namibian regime, however, is that it has shown remarkable consistency, despite its colonial and apartheid history. In the long run, Namibia's consistency and predictability in its petroleum regulatory framework may be more beneficial for attracting investment and enhancing wealth than its South African counterpart, which seems to focus more on immediate wealth-enhancing mechanisms.⁶⁷ Despite this, however, the need for transparency and accountability in the regulatory framework for petroleum is beyond dispute.

⁶⁷ Barma NH, Kaiser K, Le TM and Viñuela L *Rents to Riches? The Political Economy of Natural Resource-led Development* (2012) Washington The World Bank at 86.

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